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THE
REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

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ASSISTANT READER IN EQUITY IN THE INNS OF COURT.

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PREFACE TO VOLUME XXVIII.

THE vulgar error that the proper way of excluding an heir apparent or next of kin from the benefit of one's will is "cutting off with a shilling" is exemplified in this volume by the will of a testator who, as the Master of the Rolls observed, "was plainly ignorant of the nature and character of the office of executor, and of the distinction between real and personal estate, as it regards that office:" *Thomas v. Phelps*, p. 120. *Rex v. Benchers of Lincoln's Inn*, p. 482, is one of the few reported cases that establish and illustrate the singular position of the Inns of Court before the law as voluntary societies having much more than the powers of regular corporations, and none of the responsibility.

Bloxam v. Sanders, p. 519, is a well-known leading case on the sale of goods. The value of an advertising medical practitioner's reputation is assessed in *Dunne v. Anderson*, p. 591. Students of social history in the reign of George IV. might possibly discover something more about the plaintiff in this case. The whole duty of a prudent coachman is well set forth by Best, C. J. in *Crofts v. Waterhouse*, p. 631.

Discreet householders who would fain know in what circumstances shooting at a housebreaker is justified—a question on which there is not much direct authority—may find profitable instruction in *Rex v. Scully*, p. 780. They will also see that juries are not inclined to cut down the rights of lawful men acting in self-defence.

F. P.

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BRYANT *v.* BUSK.

(4 Russ. 1—6.)

If, after a contract for sale of an estate, but before the title is accepted, the title-deeds be destroyed by fire, this Court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of showing what were the contents of the destroyed deeds, and of proving that such deeds were duly executed and delivered.

THE bill was filed for the specific performance of a contract, entered into by the defendant for the purchase of an estate from the plaintiff. It appeared on the pleadings, that, after the delivery of the abstracts, of which there were several, and which had been compared with the deeds by the solicitor of the defendant, but prior to any approbation of the title, the office of the plaintiff's solicitor was consumed by accidental fire, and some material title-deeds were destroyed.

At the original hearing of the cause before Lord GIFFORD, he referred it to the Master to inquire whether the abstracts delivered disclosed a good title, and whether the plaintiff could then make a good title, having regard to the fact of the destruction or loss of the title-deeds.

The Master reported that the abstracts delivered did disclose a good title to the estate, and that the plaintiff *could then

1827.
Nov. 12.

Rolls Court.
LEACH, M.R.
[1]

[*2]

BRYANT
v.
BUSK. make a good title, regard being had to the fact of the destruction or loss of the title-deeds.

The defendant excepted to the report.

The cause came on to be heard in July last on the exceptions, and for further directions.

* * * * *

July 20. The MASTER OF THE ROLLS was of opinion that the plaintiff was at all events bound, if the deeds were destroyed, to furnish the purchaser with the means of proving the deeds and their contents; and that, if the abstracts were sufficient proof of their contents, yet, in order to prove the execution and delivery of the deeds, *it was necessary to know the names of the attesting witnesses. He therefore referred it to the Master to inquire who were the attesting witnesses to the several deeds destroyed.

[*3]

On a subsequent day, the plaintiff's counsel stated, that their client found upon inquiry, that he could furnish no evidence as to the names of the attesting witnesses, or as to the execution or delivery of the deeds, and was ready to consent that the cause should again be set down for hearing, as if the Master had reported that no further evidence could be furnished.

Nov. 12. The cause now came on accordingly.

Mr. Horne and *Mr. Ching*, for the plaintiff.

Mr. Shadwell and *Mr. Theobald*, for the defendant.

For the plaintiff were cited *Paine v. Meller*,† *Revell v. Hussey*,‡ *Mortimer v. Capper*: § which, it was said, established the principle, that subsequent events will not vary a contract fairly entered into, or affect the right of a party to have such a contract specifically performed. And it was insisted, that the defendant having become by the contract the equitable owner of the property, the destruction of the title-deeds was his loss, and he must nevertheless abide by the contract: and, further, that, if the proposition could not be maintained to that extent, yet his solicitor, having examined the deeds with the abstract, had

† 5 R. R. 327 (6 Ves. 349).

§ 1 Br. C. C. 156.

‡ 12 R. R. 87 (2 Ball & B. 280).

the opportunity, before the fire happened, to inform himself of the *names of the attesting witnesses to the deeds, and if he had failed to do so, the defendant must suffer from his negligence.

BRYANT
C.
BUSK.
[*4]

THE MASTER OF THE ROLLS :

In this case it is not open to the defendant to contend that the mere destruction of the title-deeds will discharge a purchaser from the contract. In order to raise that question, he must rehear Lord GIFFORD's decree, which necessarily infers that a purchaser may be bound, notwithstanding the loss of the title-deeds.

The case of *Paine v. Meller* has no application here. There, after the title was accepted, the houses, which were the subject of the contract, were destroyed; and Lord ELDON was of opinion, that, the equitable title being complete, the loss must fall upon the purchaser, although he had at the time no conveyance. The other cases cited refer to the same principle. This is the case—not of the destruction of the property—but of the destruction of the title-deeds before a conveyance, and before the title was accepted.

Every vendor must necessarily be bound to furnish the purchaser with the means of asserting his title and defending his possession. The title-deeds are the ordinary and primary means for that purpose. If the primary means do not exist, there may be secondary means to the same end. There may be means of proving what were the contents of the deeds, and that the deeds were duly executed and delivered. Assuming that the abstracts here duly and fully prove the contents of the deeds, yet, it remains to be proved that such deeds were duly executed and delivered; and the vendor must furnish the purchaser with the means of such proof. And, it being admitted that no such proof *can be furnished, the purchaser is entitled to be discharged.

[*5]

With respect to the alleged specialty in this case,—that the defendant's solicitor, having before the fire examined the deeds for the purpose of comparing them with the abstracts, had the opportunity to learn who were the attesting witnesses, and that the defendant must sustain the inconvenience of his negligence

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in that respect,—it is to be observed, that the purpose of the examination of the deeds by the defendant's solicitor was merely to ascertain, whether the contents of the deeds corresponded with the statement in the abstract, and not to learn how the deeds were to be proved by secondary evidence, in case they should be destroyed; which event could not at that time be in the contemplation of any party: and, therefore, it cannot be imputed to him as culpable negligence, that he did not inform himself of the names of the attesting witnesses.

The bill must, therefore, be dismissed; and, as the plaintiff fails in his case, it must be dismissed with costs.

* * * * *

—♦—

THOMAS v. BRIGSTOCKE.†

(4 Russ. 64—66.)

1827.
Nov. 29.
Rolls Court.
LEACH, M.R.
[64]

A mortgagee has no title to the rents of the mortgaged premises, which have been paid into Court by a receiver appointed in a suit for establishing the will of the mortgagor; notwithstanding that, after the appointment of a receiver, he gave notice to the tenants to pay the rents to him.

He ought to have followed up that notice by moving to discharge the receiver.

THIS was the petition of a mortgagee, to be paid the rents of the mortgaged premises, which had accrued due since the 18th of June, 1818, and had been paid into Court by a receiver, who was appointed on the 22nd of May, 1818, in a suit to which the mortgagee was not a party, and which was instituted for the purpose of carrying into execution the trusts of the mortgagor's will.

After the appointment of the receiver, the mortgagee, whose title was at that time disputed, had given notice to the tenants of the mortgaged estate to pay their rents to him; but, in consequence of the appointment of a receiver, the notice had been disregarded.

In March, 1827, a petition was presented by the mortgagee,

† *Law v. Glenn* (1867) L. R. 2 Ch. 634.

praying that the receiver might be discharged; and, on the 6th of August, 1827, an order, discharging the receiver, was made.

THOMAS
v.
BRIGSTOCKE.
[65]

The rents in Court had accrued due between the time of the receiver's appointment and the time of his discharge.

Mr. Sugden and Mr. Ching, for the petition.

Mr. Bickersteth and Mr. Jacob, *contrà*.

For the petitioner, the mortgagee, it was argued, that he had entitled himself at law to the rents by his notice to the tenants in June, 1818, and that equity would not permit the appointment of a receiver to deprive the mortgagee of his legal rights.

Bertie v. Abingdon,† and *Gresley v. Adderley*,‡ were cited.

THE MASTER OF THE ROLLS :

A mortgagee is entitled only to such rents as accrue due when he is in possession of the mortgaged premises. His notice to the tenants could not divest the possession of the receiver, which was in truth the possession of those who claimed under the will of the mortgagor. For the purpose of divesting the possession of the receiver, an application to the Court was necessary; and it seems that the mortgagee actually made such application a few months since, and obtained an order for the discharge of the receiver. From the time of the discharge of the receiver, or perhaps from the time when his application was first made for that discharge, he may be considered in possession: but he can have no intermediate rents, when he was out of possession.

The mortgagee appealed from this decision.

[66]

Mr. Sugden and Mr. Ching, in support of the appeal. * * *

Mr. Bickersteth and Mr. Jacob, *contrà*.

The LORD CHANCELLOR dismissed the petition of appeal with costs.

† 17 R. R. 125 (3 Mer. 560).

‡ 18 R. R. 146 (1 Swanst. 573).

BUTTER v. OMMANEY.†

(4 Russ. 70—74 ; S. C. 6 L. J. Ch. 54.)

1827.
Dec. 5.
Rolls Court.
LEACH, M.R.
1828.
August.
SHADWELL,
V.-C.
[70]

A bequest to all the children of A. and their issue, in case any of them should die leaving issue, share and share alike, and to be paid twelve months after the testator's decease, is an absolute gift to such children of A. as are living at the testator's death, with a substitution of their issue in case of death before the period of division.

A testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should be then living ; and as to such of them as should be then dead, leaving children, he directed that the children should stand in the place of their parents : Held, that the children of such children of B. as died in the testator's lifetime took no share of the residue.

BERNARD BUTTER, by his will, dated on the 7th of August, 1818, bequeathed to the children of his brother Joseph Butter and their lawful issue, in case any of them should die leaving lawful issue, the sum of 2,000*l.* to be equally divided among them, and payable one year after their father's, and his, the testator's, decease, but without interest in the mean time. Then, after a similar bequest of 2,000*l.* to the children of his late sister Betty Pratt and their lawful issue, in case any of them should die leaving lawful issue, he gave "unto and amongst all and every the child and children of his late brother, Jacob Butter, deceased, and their issue, (except his nephew Bernard Butter), the sum of 2,000*l.*, to be equally divided amongst them, share and share alike," to be paid within twelve months next after his, the testator's, decease. As to the residue of his estate, real and personal, after providing for certain payments and creating a trust for accumulation, he gave it, after the death of his wife and his brother Joseph, to be equally divided between the children of his said brother Joseph Butter, and his late sister Betty Pratt, and late brother Jacob Butter, (except Bernard Butter), who should be then living, in equal shares and proportions ; and as to such of them as should be then dead, leaving a child or *children, such child or children were to be and stand in the place or places of his, her, or their parent or parents.

[*71]

The suit was instituted by Jacob Butter, Benjamin Butter, and

† *West v. Orr* (1878) 8 Ch. D. 60 ; 47 L. J. Ch. 294 ; *In re Wood*, '94, 3 Ch. 381 ; 63 L. J. Ch. 790.

James Butter, who were the only children of the testator's brother, Jacob Butter, living at the death of the testator, or at the date of his will. They had children living. There had been other children of Jacob the brother, who had died leaving children.

BUTTER
v.
OMMANEY.

The question was, whether the plaintiffs took the 2,000*l.* absolutely; or whether their issue and the issue of deceased children of Jacob Butter, or any of such issue, had any interest in the bequest.

Mr. Horne and *Mr. Wray*, for the plaintiffs, argued that the bequest to the children of Jacob Butter and their issue, gave the children of Jacob Butter, who were living at his death, a quasi estate: tail *Lampley v. Blower*; † and, therefore, that the plaintiffs were entitled to the legacy absolutely.

Mr. Sugden and *Mr. J. Russell*, for the children of a daughter of Jacob Butter, who died in the testator's lifetime, *contra* :

It is apparent from the bequests to the families of Joseph Butter and Betty Pratt, and also from the residuary clause, that the issue of deceased nephews and nieces were among the objects of the testator's bounty, and that he meant them to participate with their uncles and aunts; and the clause relating to the children of Jacob Butter, though the language of it is not so full *as the expressions in the bequests to Joseph and Betty and in the residuary disposition, may be fairly construed as a gift to the children of Jacob living at the testator's death, and to the issue of such of them as should be then dead. * * *

[*72]

The MASTER OF THE ROLLS held, that the legacy of 2,000*l.* vested absolutely in the three children of Jacob *Butter, the brother of the testator, who were living at the testator's death, to the exclusion both of the issue of those three children, and of the issue of such children of Jacob the brother as died in the testator's lifetime.

[*73]

† 3 Atk. 396.

BUTTER
v.
OMMANEY.

The cause was heard on further directions before the Vice-Chancellor: and the question then was, whether, under the residuary clause, the children of such children of the testator's brothers and sister as died in his lifetime,† were entitled to a share of the residue.

On behalf of the claim of the children of such deceased children, it was argued that the plan of the testator was to substitute the issue of deceased nephews and nieces as objects of his bounty in the place of their parents; and that whatever the parent would have taken, had he or she been alive at the time of the distribution of the fund, was to go to their children. It was of no importance whether a nephew or niece died in the lifetime of the testator or after his death: in neither case could he or she take, if they died before the period fixed for the division of the fund; but if they left children, those children were to take in their stead. The direction, that "such children were to stand in the place of their parent," did not mean that they were to take what had become vested in the parent; for no share of the residue vested in the nephews and nieces, till the time of distribution arrived; and the limitation in favour of the children of nephews and nieces had reference to the children of such nephews and nieces only as had died previously. The clause, therefore, was an express direction, *that, if, when the period of distribution came, any of his nephews and nieces were dead, leaving children, those children were to take what the parent, if alive, would have taken: and to exclude children of nephews and nieces who died before the testator, was to impose on the bequest a restriction not prescribed or justified by the words of the will.

[*74]

The VICE-CHANCELLOR held, that the children of such children of Joseph Butter, Betty Pratt, and Jacob Butter, as died in the testator's lifetime, were not entitled to any share of the residue.‡

† The children, who died in his lifetime, were all dead at the date of the will.

‡ *Christopherson v. Naylor*, 15 R.R. 120 (1 Mer. 320).

“Declare that the clear residue of the testator’s estate and effects vested in such of the children only of the testator’s brothers and sisters, Jacob Butter, Joseph Butter, and Betty Pratt, as were living at his decease, in equal shares, subject, as to each of such shares, to be devested in favour of their children, as joint tenants of the parent’s share, in case of the parent’s death before the period of division.”

BUTTER
v.
QMMANEY.

AMPHLETT v. PARKE.

(4 Russ. 75—76.)

Will conversion.

[Reversed on appeal, 2 Russ. & M. 221.]

1827.
Dec. 5.
Rolls Court.

EDWARDS v. ALLISTON.†

(4 Russ. 78—85; 6 L. J. Ch. 30.)

Cross-remainders cannot be implied in a deed, and are not created as to accruing shares by a limitation of the entire estate to an only surviving child and his issue, or by a gift over of the entire estate in remainder after the failure of all issue, or by an express creation of cross-remainders as to the original shares.

1827.
Dec. 6, 10.
Rolls Court.
LEACH, M.R.
[78]

By indentures of lease and release bearing date on the 26th and 27th of August, 1782, being the settlement made on the marriage of James Crompton and Sarah Corney, Thomas Sandford, the uncle of Sarah Corney, conveyed certain lands and tenements to the use of Sarah, the wife of him Thomas Sandford, and her assigns, for her life; remainder to the use of James Crompton and his assigns, during his natural life; “remainder to the use of Berkhead Hitchcock and Robert Dean, and their assigns, during the life of James Crompton, upon trust to support contingent remainders; remainder to the use of Sarah Crompton, and her assigns, during her life; remainder to the use of all and every the child and children

† In *Doe d. Clift v. Birkhead* (1849) 4 Exch. 110, it was held that a limitation of cross-remainders in tail of the share of a child would carry any accruing shares as well as the original share of the child over to the other children in tail, so the

Vice-Chancellor might have decided the case of *Edwards v. Alliston* in favour of the plaintiff without infringing the rule that cross-remainders cannot be implied in a deed.—O. A. S.

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v.
ALLISTON.

of the body of James Crompton on the body of Sarah his wife, lawfully begotten or to be begotten, equally to be divided between or among them; if more than one, share and share alike as tenants in common, and not as joint tenants, and to the use of the several and respective heirs of the body and bodies of all and every such child and children lawfully issuing; and if there should be a failure of issue of the body or bodies of any such child or children, then as to the part or share, or parts or shares, of such child or children, when issue should so fail, to the use of the remaining and other children of the body of James Crompton, on the body of Sarah his wife lawfully begotten or to be begotten, equally to be divided between or amongst them, if more than one, share and share alike, and they to take as tenants in common and not as joint tenants, and to the use of the several and respective heirs of the *body and bodies of such remaining and other children lawfully issuing; and, in case there should be a failure of issue of the bodies of all such children but one, or, if there should be but one such child, then to the use of such only remaining or only child, and the heirs of his or her body lawfully issuing:" and for default of such issue, to the use of the right heirs of Thomas Sandford for ever.

[*79]

There were seven children of the marriage, four of whom died without issue: viz. James Dickenson, who died in 1828; Thomas, who died in 1785; Joshua, who died in 1800; and Margaret, who died in 1811. In 1825, Mary, Sarah, and Louisa, the three surviving children and their husbands suffered a common recovery, which, it was declared, should enure to the use of Edwards and Barlow, and their heirs upon certain trusts.

Edwards and Barlow, having agreed with the defendants for a sale of the premises, filed a bill to enforce the performance of the contract. The usual reference was directed; and the defendant carried in various objections to the title. Of these the principal was the following:—That, in consequence of the want of words in the indenture of the 27th of August, 1782, to create cross-remainders as to the surviving shares taken by the children who afterwards died without issue, the vendors had not shewn a title to the three-sixths of the one-seventh share

alleged to have belonged to Thomas Crompton, which, on his death without issue, survived to his brothers James and Joshua, and his sister Margaret; nor to the two-fifths of the one-seventh share alleged to have belonged to Joshua, which, on his death without issue, survived to James and Margaret; nor to the one-fourth of the one-seventh share alleged to have belonged *to Margaret, which, on her death without issue, survived to James.

EDWARDS
v.
ALLISTON.

[*80]

The Master reported that a good title was shewn; and the defendants excepted to the report.

Mr. Tyrrell, in support of the exception, cited * * *Doe v. Wainwright*,† *Doe v. Dorrell*,‡ *Doe v. Worsley*,§ *Meyrick v. Wishaw*,|| *Levin v. Weatherall*.¶ These authorities, he argued, established the rule, that, in a deed, cross-remainders cannot be raised by implication, however evident it may be that the probable intention of the parties was, that there should be cross-remainders. * * *

Mr. Sugden and *Mr. Seton*, for the plaintiffs:

* * The question is one not of implication, but of construction. We do not say that cross-remainders are to be implied; but we contend that no precise form of *words is necessary in order to create cross-remainders, and that the words, which are used here, if fairly construed, so as to give them full effect, are sufficient to carry the original, as well as the accrued, shares to the surviving children. * * *

[*81]

The clauses, which provide for the events of all the children, or of all the children except one, dying without issue, distinguish this case from all those in which it has been held that cross-remainders were not created.

[82]

THE MASTER OF THE ROLLS:

Dec. 10.

In this case, the impression which was made upon my mind, in favour of the title, has been removed by an attentive consideration of all the authorities.

† 2 R. R. 634 (5 T. R. 427).

|| 21 R. R. 501 (2 B. & Ald. 810).

‡ 2 R. R. 662 (5 T. R. 518).

¶ 21 R. R. 669 (1 Brod. & B. 401;

§ 6 R. R. 303 (1 East, 416).

4 B. Moore, 116).

EDWARDS
c.
ALLISTON.

The bill is filed for the specific performance of a contract for the sale of an estate. Upon a reference to the Master, he reported in favour of the title; and to this report the purchaser took an exception.

[83] The objection to the title was, that, although cross-remainders were limited as to the original shares of each child, yet they were not limited as to the shares which accrued to the remaining children by the subsequent deaths of others; and, consequently, that the three remaining children could not make a good title to the parts or shares, which, upon the successive deaths of the three children, who had died last, had respectively accrued to those children. For the vendor it was argued, that the limitation of the whole estate to the only remaining child, and the heirs of his body, in case there should be only one remaining child, and the limitation over of the whole estate in default of all issue, added to the express limitation of cross-remainders with respect to the original shares, not only left no doubt of the settlor's intention to create cross-remainders as to the accruing shares, but amounted, even in a deed, to a sufficient declaration of his purpose to give effect to his intention.

Of the intention of this settlor to create cross-remainders, as to the accruing shares, there can be no reasonable doubt. The question is, Whether he has so expressed that intention, as to give effect to it in a deed? The direction that the estate should go wholly to an only surviving child, and should wholly go over in remainder, if there was a failure of issue of all children, plainly denotes the settlor's intention; because these ultimate purposes could not be effected without cross-remainders as to the accruing as well as the original shares: and it must be inferred, that he who intends a particular purpose, must intend the means by which that purpose is to be accomplished. But the authorities say, that this is mere implication, and that, although it would give effect to a will, it cannot operate in a deed: and such is the result of several cases which have been

[*84]

cited in this argument. It did not, however, occur in *the decided cases, that the settlor had expressly created cross-remainders as to the original shares of the children: and it is contended that this circumstance, added to the direct limitation

of the entire estate to the only surviving child, and the gift over of the entire estate in remainder upon the failure of all the children and their issue, not only clearly manifest the settlor's intention, but amount altogether to a sufficient expression of that intention in a deed.

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v.
ALLISTON.

It must be admitted, that, under these several circumstances, no doubt can be entertained of the settlor's intention : but still the difficulty remains, whether you can arrive at this conclusion without that sort of implication, which in such cases is excluded from the construction of a deed. If the inference that the settlor must have intended that cross-remainders, as to the accruing shares, should be created, because he has intended a purpose which could be effected only by such means, is to be considered as an implication which is to be rejected in the construction of a deed—must not the inference, that the settlor intended that cross-remainders should be created as to the accruing shares, because he has expressed such an intention as to the original shares, be considered also as an implication, which is to be equally rejected in a deed? Can this additional circumstance do more than afford additional implication of the same intention? And if the Court cannot act at all in this matter by implication, can it be of importance, whether there is one circumstance only or ten circumstances, which afford the same implication? The case of *Doe v. Wainewright*† has been referred to in this argument. In that case, as in this, there was a *limitation of the entire estate to an only child, and the remainder over of the entire estate was limited upon the failure of all issue; and in that case, as in this, there was also an express creation of cross-remainders as to the original shares. But in that case there immediately followed these words:—"And so, *toties quoties*, as any of the said children should die without issue, till there should be only one child left." These latter words, which, unfortunately, are not found in this case, were very properly considered as expressly extending the cross-remainders to the accruing shares; and that case, therefore, is no authority for this.

[*85]

Upon an accurate view of all the cases, I am compelled to

† 2 R. R. 634 (5 T. R. 427).

EDWARDS
v.
ALLISTON.

declare, that, although there is no doubt here of the settlor's intention, yet, there is no authority to be found in the books, which would justify me in stating, that the settlor has used here such expressions, with respect to the accruing shares, as are in a deed necessary to raise cross-remainders with respect to the accruing shares; and, least of all, can I come to that conclusion as against a purchaser.

The exception to the Master's report of a good title must be allowed.

1827.
Dec. 6.

FARMER v. MILLS.†

(4 Russ. 86—87.)

Rolls Court.
LEACH, M.R.
[86]

A testator, by his will, gave certain annuities, and directed that the sums set apart to secure them, should, as the annuitants died, sink into the residue of his personal estate: By a codicil to his will, he stated, that, in case his property would not provide an income equal to the annuities, they should be rateably reduced: His estate was deficient, and the annuities were rateably reduced: Upon the death of any annuitant, the sum set apart to secure the reduced annuity, will belong to the residuary legatees, and is not to be applied to increase the reduced annuities to the amount given by the will.

THE testator in this case by his will gave certain annuities, which were to be secured by the investment of sufficient sums either in the funds or on mortgage: he directed, that, as the annuitants should die, the sums, by which the annuities were secured, should sink into and become a part of the residue of his estate: and he named several persons as his residuary legatees. By a codicil to his will he stated, that, upon reflection, he considered it to be probable, that, after full payment of his funeral expenses, debts, and legacies, there might not be property left, which would be adequate to produce interest sufficient to pay the annuities given by his will; and in such case he directed that an equal deduction should be made from each annuity rateably according to its amount, after the expiration of six months from his death: in which time he considered that his affairs might be closed, so as to ascertain the amount of his property.

† *Re Tootal's Estate* (1876) 2 Ch. D. 628.

His estate did prove insufficient for the full payment of the several annuities given by his will: and the question in the cause was, Whether, upon the death of any annuitant, the sum set apart to secure his reduced annuity should be applied to increase the other annuities, until they were made to amount to the sums given by the will? or, whether the sum so set apart should belong to the residuary legatees?

FARMER
v.
MILLS.

THE MASTER OF THE ROLLS:

If the case had rested upon the will, the residuary legatees could have taken no benefit, until the annuities * were fully provided for. By the codicil the testator, in case of the deficiency of his property to supply by its interest the whole amount of the annuities given by his will, directs that those annuities shall be rateably reduced, so as, upon the whole, not to exceed the income of his property. The annuitant, who receives his reduced annuity, receives all that the testator intended he should receive, in case of the deficiency of his property: and the sum set apart to secure the reduced annuity will sink into the residue, in the same manner as it would have done, if the property had been adequate to provide for the sum given by the will.

[*87]

HARRIES v. BRYANT.†

(4 Russ. 89—91.)

The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted, upon the death of one of the cestuis que vie, to apply for a renewal within the six months, filed his bill praying relief, upon the ground that he did not, within the six months, know that the person was dead, or that the deceased person was one of the cestuis que vie named in the lease: The bill was dismissed with costs; because the plaintiff might have known the facts, if he had used reasonable diligence, and acted with ordinary prudence.

1827.
Dec. 10.
Rolls Court.
LEACH, M.R.
[89]

THE plaintiff had taken an assignment of a lease for three lives, which contained a covenant for renewal from time to time,

† *Nicholson v. Smith* (1882) 22 Ch. D. 640; 52 L. J. Ch. 191.

HARRIES
v.
BRYANT. on the falling of each life, upon payment of a small fine, provided application were made for renewal within six months after the life dropped. Alcock, one of the cestuis que vie named in the lease, died on the 31st of January, 1822; no application was made for a renewal, until the 12th of November, 1822; and, renewal being then refused, this bill was filed.

Alcock had removed from the place where he resided at the granting of the lease; but died in the immediate neighbourhood of the plaintiff; having been for some years the overseer of a parish adjoining to that in which the plaintiff resided. The plaintiff alleged, that he neither knew that the deceased person was the life named in the lease, nor that he was dead, until after the expiration of the six months.

Mr. Sugden and Mr. Cooper, for the plaintiff. * * *

[None of the cases cited are referred to in the judgment.]

[91] THE MASTER OF THE ROLLS :

A court of equity will relieve against the effect of an express covenant, where strict performance of the condition is prevented by ignorance not wilful, or by unavoidable accident. Ignorance is considered to be wilful, where a person neglects the means of information, which ordinary prudence would suggest; and accident is not unavoidable, which reasonable diligence might have prevented.

When the plaintiff became the assignee of a lease containing such a conditional covenant for renewal, ordinary prudence would have suggested, and reasonable diligence would have required, that he should have ascertained who the lives were, and have taken measures to secure early information of their deaths. All this he appears to have neglected; his ignorance, therefore, was wilful, and the accident not unavoidable, assuming the facts to be as he alleges them. Let the bill be

Dismissed, and with costs.

LAW *v.* THOMPSON.†

(4 Russ. 92—102; S. C. 6 L. J. Ch. 56.)

The intention of a testator, that his gift should not vest in the legatee until it should be actually remitted to him, will prevail, when clearly expressed, provided the remittance be not delayed by negligence or inevitable accident.

1827.
Dec. 12, 13.

Rolls Court.
LEACH, M. R.
[92]

THE testator, Clotworthy Thompson, who was a lieutenant in the East India Company's service on the Madras station, made his will in India, bearing date on the 20th of August, 1775, and containing the following bequests :—

"I give and bequeath to my father, John Thompson, of Muchamoro, near Antrim, Ireland, the sum of 5,000 star or current pagodas of Madras, for his sole and proper use; but, in case of his death before the said sum of 5,000 star or current pagodas be paid into his hands, then and in that case I will and bequeath the same to my uncle Thomas Thompson, of Green Mount, near Antrim, Ireland, to be by him justly, equally, and equitably divided and distributed among all my brothers and sisters alive, when this my last will and testament shall be put into execution." He then gave two small legacies, one of which was to a charity in Ireland, and the other was payable in India; and proceeded thus:—"I also appoint Lieutenant-Colonel Russell, Captain Gibbings, and Lieutenant Knox to be the joint executors of my will, to whom my whole property is to be paid; and I request that, after they have received what money is or may be due to me, whether by bonds or notes, as will be found in my escritoire, or by the amount of my effects, &c. &c. when sold by their authority, or rather as soon as a court of inquiry shall have taken an inventory of them, (for I request of the commanding officer, that, as soon as the said inventory is sent off to my executors, he will afterwards, as conveniently *or as advantageously as he may think proper, order the whole of my things and effects to be sold),—I say I request that then my executors will, by the first good opportunity, remit the whole, I mean that part bequeathed and given to my father, or, in case of his death,

[*93]

† *Johnson v. Crook* (1879) 12 Ch. D. 639; 48 L. J. Ch. 777; *Re Collison* (1879) 12 Ch. D. 834; 48 L. J. Ch. 720.

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to my uncle for the use of my brothers and sisters," as well as the legacy given to the charity in Ireland, "to my good friends Messrs. Allen, Marlar, and Boyd, merchants in London, to be by them, and under the inspection of my executors, remitted as above mentioned to my father, &c. &c., as above described. Lastly and finally, I do direct, that, if, after my property is collected and effects sold, there remains any sum over and above what I have herein bequeathed, it shall be added to that which I have bequeathed to my father, or, in case of his death to my uncle, for the use, and to be divided amongst, my brothers and sisters, and is also to be remitted as above directed to my friends Allen, Marlar, and Boyd, in London. Should there be any deficiency, in my whole properties not amounting to the sums or legacies within mentioned or bequeathed them, then and in that case I desire such deficiency may be deducted from that sum above, which is herein bequeathed and given to my father; and not by any means, or on any account whatsoever, to infringe upon or to be deducted from either of the sums given and bequeathed by me herein for charitable uses."

He afterwards made the following codicil to his will:—
"I further bequeath unto the child named Martha Fletcher, left to my care by its parents, the sum by them appropriated to its use, namely, 1,000 star pagodas; the child, with the above 1,000 pagodas, to be sent to Europe to the charge of my father, or, in case of his death, to my brothers and sisters jointly: as the sum of 1,000 pagodas is to revert to me, should the said child die *before its amount is appropriated to its use, I do will and bequeath it in such case to my father, or, in case of his death, to my brothers and sisters alive, equally to be divided; and it is to be remitted in the manner directed by my will for the sum left to my father, or, in case of his death, to my brothers and sisters."

[*94]

The testator died in India, in 1779. The executors named in his will renounced the probate; and the testator's brother, John Thompson, who was in India, administered to his will, and afterwards died in December, 1779. Between the making of the will and his death, the testator purchased one of the Nabob of Arcot's bonds for a sum of 7,000 pagoda: and from

the death of John Thompson, the administrator, until the year 1807, there was no personal representative of the testator ; but, in 1807, the testator's brother, the defendant Hugh Thompson, took out administration *de bonis non*, for the purpose of claiming the amount of the Nabob's bond from the commissioners appointed under the Act of Parliament for the liquidation of the Nabob's debts. This claim was admitted ; and a large sum of Carnatic stock was appropriated in satisfaction of the bond.

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The first administrator, John Thompson, had received some part of the testator's estate, but made no remittances to Europe, and died insolvent. Other small parts of the testator's estate were afterwards collected on account of the family, during the life of the father ; but no remittance was ever made to him : and the Nabob's bond constituted the great bulk of the property.

After the death of the administrator, John Thompson, this bond was, in the year 1788, delivered over by General Orr, with whom John Thompson had deposited *it, to Mr. Boyd in India, who acted under a power of attorney for the father. The father died in 1796, when no money had been received on account of the bond ; and, by his will, he gave his interest under the testator's will to two of his sons, who were defendants to the suit.

[*95]

The plaintiffs claimed in right of the other brothers and sisters of the testator ; and filed their bill, contending, that, by the death of the father, before any part of the testator's property came to his hands, the gift over to the brothers and sisters took effect.

The defendants, who claimed through the father, insisted, that the father's interest vested at the death of the testator ; or that otherwise the delivery of the Nabob's bond by General Orr to the agent of the father, was equivalent to the payment of the money into his hands ; or that, as the bond might have been sold during the father's lifetime, his interest was not to be defeated by the omission to sell it.

Mr. Sugden and Mr. Koe, for the plaintiffs :

* * The Court, it is true, will not, upon conjecture, impute

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to a testator the intention that a bequest is not to vest, till the property is realized and the money actually paid; but it is equally certain, that a testator may so dispose of his property, that none shall take, except those who live to receive with their own hands: * * *Elwin v. Elwin*,† and *Gaskell v. Harman*;‡ and though the decree in the latter case was reversed by Lord ELDON, the reversal proceeded exclusively on the ground, that the will did not manifest a clear intention that the property should vest only as it was received and converted into money. The decision of Lord THURLOW in *Hutcheon v. Mannington*§ does not contradict or vary the doctrine.

[96]

[98]

Mr. Pepys and Mr. Collinson, contra :

[*99]

Hutcheon v. Mannington is expressly in point. * * In some cases there has been a manifest purpose, that legacies should not be *paid or a residue distributed, till a certain state of things should have arisen; and that circumstance, wherever it occurred, has always been very much relied on, when questions of this kind have been discussed, as a ground for postponing the period of vesting: *Elwin v. Elwin*,† *Sitwell v. Bernard*.|| Here there is no such purpose; the testator did not mean to delay the payment of the bequest to his father, till other objects were accomplished; on the contrary, his desire was, that the money should be remitted with all possible speed; and the delay, which prevented the father from actually receiving the money, though he survived his son by seventeen years, arose out of accidents which the testator never contemplated. * * *

[*100]

John Thompson, the administrator, delivered the bond to Colonel Orr, and Orr delivered it to Boyd, who was the father's agent. This possession of the bond by the father, through his agent *Boyd, with the assent of the administrator, was equivalent to actual receipt of the legacy.

THE MASTER OF THE ROLLS :

In the case of *Hutcheon v. Mannington*, Lord THURLOW

† 7 R. R. 117 (8 Ves. 547).

§ 2 R. R. 115 (1 Ves. Jr. 365).

‡ 8 R. R. 224, 232 (6 Ves. 520;

|| 5 R. R. 374 (6 Ves. 520).

11 Ves. 489).

considered that the words used as to the death of the legatee were too vague to express a definite time upon which he could act with certainty: but Lord ELDON, who was counsel in that cause, has in the discussion of other cases frequently stated that he was, at the time of the argument, and continued to be, of a different opinion, and that the only use he had made of that case was, to consider it as an authority for the principle, that the intention of the testator in similar cases must be clearly expressed.

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Here, the property of the testator being in India, he has directed it to be collected by his executors, and to be remitted by them to merchants in London, and by these merchants remitted to his father in Ireland; and he has most clearly expressed his purpose, that, in case of his father's death before he should receive the remittance, the property should go over to his uncle for the benefit of his brothers and sisters. In this case there is no difference between the legacy of the 5,000 pagodas, and the residuary estate, and the legacy of 1,000 pagodas given by the codicil in case of the death of the infant. The condition as to the death of the father before the money is remitted, is plainly to be referred as well to the gift of the residuary estate, as to the legacy of 1,000 pagodas given by the codicil.

It has been considered to be doubtful what the testator meant by the expression, that, in case of the death of his father, the legacy of 5,000 pagodas should be distributed amongst all his brothers and sisters, who *should be alive when his will should be put into execution. It would have been reasonable to suppose, that he meant the same thing as he had just before expressed in other words with respect to his father, namely,—brothers and sisters who should be alive, when, in the execution of his will, the money should be remitted; but the codicil bears strongly upon this point. The infant's legacy of 1,000 pagodas is given to the father, or, in case of his death, "to his brothers and sisters alive, equally to be divided," and to be remitted in the manner directed by his will. "In case of the death of his father," plainly means in case of his death before the money is remitted: the inference therefore is, that the money is to be equally divided between his brothers and sisters who shall be alive when the

[*101]

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v.
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money is remitted; and this same construction must apply with respect to the interest of the brothers and sisters in the legacy of 5,000 pagodas and the residuary estate.

It has been argued, that the delivery of the Nabob's bond by General Orr to the father's agent in India was tantamount to his possession of the money. But the father had no title to the bond, nor had General Orr any authority to deliver it. Neither could the bond have been sold.

If, however, the executors named in the testator's will, having taken upon themselves the administration of his estate, could, with reasonable diligence, have collected it, and remitted the produce to his father in his lifetime, I should be of opinion that the rights of the father could not be defeated by the accidental circumstances of this case: and, upon that principle, it must be referred to the Master to inquire, whether, if the will had been proved by the executors named in it, and reasonable diligence had been used by them, any *and what part of the testator's property given to the father, could have been remitted to him in his lifetime; with liberty to the Master to state any circumstances specially.

[*102]

JONES v. MUDD.†

(4 Russ. 118—123; S. C. 6 L. J. Ch. 26.)

1827.
Nov. 5, 7.
Lord
LYNDHURST,
L. C.
[118]

A purchaser, who has not been in possession, is bound to pay interest on the purchase-money, and take the rents and profits, only from the time when a good title was first shown, and not from the time fixed by the agreement for the completion of the purchase.

By articles of agreement bearing date the 14th of November, 1820, and made between Jones of the one part, and Mudd of the other part, Jones agreed to sell and Mudd agreed to purchase a certain farm at the sum of 4,150*l*. It was stipulated that Jones should, within four months, deliver unto Mudd a satisfactory abstract, and deduce a marketable title to the estate; and that he should, on or before the 11th of October

† *De Visme v. De Visme* (1849), 1 Mac. & G. 336.

then next, upon receiving from Mudd the sum of 4,150*l.*, or security for the same, effectually convey to him the farm, and deliver up all deeds and evidences relating to it. Mudd, on the other hand, agreed, that, upon such conveyance and assurance being executed and perfected, and upon receiving possession of the estate on the 11th of October then next, he would pay unto Jones 1,150*l.*, and would execute to him a valid mortgage of the premises contracted to be purchased, as a security for the sum of 3,000*l.* and interest at 5 per cent. Jones was to be entitled to the rent of the farm till Michaelmas, 1821, and was to clear all outgoings up to that time.

JONES
v.
MUDD.

After the delivery of an abstract pursuant to the agreement, Mudd refused to perform the contract, on the ground that a good title to the estate was not made out; and Jones, in February, 1823, filed his bill for specific performance.

In December, 1823, an order was made, referring it to the Master to inquire whether a good title could be made to the farm; and in case the master should find *a good title could be made, he was to inquire, when it was first shown that such good title could be made.

[*119]

The Master certified, that he was of opinion that a good title could be made to the estate, and was first shown on the 15th of January, 1827.

By an order made on petition in April, 1827, the VICE-CHANCELLOR ordered the agreement to be specifically performed; and he directed that the defendant should pay and secure to the plaintiff the sum of 4,150*l.* with interest at 5*l.* per cent. from the 15th of January, 1827, deducting thereout the rents and profits received by the plaintiff, which had accrued since the 15th of January, 1827, or which might accrue or be received by him before the execution of the assurances thereafter directed to be made. The costs of the suit up to the date of the Master's report were to be borne by the plaintiff.

The plaintiff appealed from this order, and insisted, that interest ought to have been computed on the purchase-money, not from the 15th of January, 1827, but from the 11th of October, 1821; the defendant being, on the other hand, entitled to an account of the rents accrued due from that time.

JONES *Mr. Treslove and Mr. Rolfe*, in support of the appeal
 &
 MUDD. [cited *Harford v. Purrier*].†

[121] *Mr. Sidebottom, contra* [relied on *Esdaile v. Stephenson* ‡].

Nov. 7. The LORD CHANCELLOR expressed his assent to the rule as
 [123] stated by Sir JOHN LEACH in *Esdaile v. Stephenson*, and

Dismissed the appeal.

1827.
 Nov. 8.

NANNY v. EDWARDS.

• (4 Russ. 124—125 ; S. C. 6 L. J. Ch. 20.)

Lord
 LYNDEHURST,
 L.C.

A first application by a mortgagor to enlarge the time for payment of
 the mortgage money refused.

[124]

THE bill was filed in 1824, by a second mortgagee for 5,000*l.*, to redeem a first mortgagee for 7,000*l.*, and to foreclose the mortgagors, and a third mortgagee for 3,000*l.* The decree for redemption and foreclosure was made in May, 1826. The Master's report of what was due on the mortgages was made in the following December. The plaintiff redeemed the prior incumbrancer ; and, in June, 1827, the second report was made, stating the sum due to the plaintiff to be upwards of 14,000*l.*, and fixing a day for the payment of it.

A motion, on behalf of the mortgagor, to enlarge for three months the time fixed for the payment of the mortgage-money, had been made before the Vice-Chancellor, but was refused.

It was now renewed before the Lord Chancellor.

The motion was supported by an affidavit that the estate was worth upwards of 20,000*l.* ; that the mortgagors had endeavoured to sell the estate ; and that they hoped to raise the money within three months.

On the other hand, an affidavit, filed in opposition to the motion, stated, that the rental of the property was only 550*l.*

† 16 R. B. 260 (1 Mad. 538).

‡ 24 R. B. 151 (1 Sim. & St. 122).

a year, and that the plaintiff had been obliged to borrow money in order to pay off the first incumbrancer.

NANNY
c.
EDWARDS.

Mr. Wyatt, for the motion. * * *

[125]

Mr. Sugden and *Mr. Duckworth*, *contrà*.

THE LORD CHANCELLOR:

The Court, in order to induce it to enlarge the time for redemption, must have some reason assigned (though it does not require a very strong one), why the mortgagor did not pay the interest, principal, and costs at the time appointed by the report. In this case no excuse for his default is stated.

The motion was refused with costs.

BROWN v. DE TASTET.†

(4 Russ. 126—127.)

It is competent to the Court, on the hearing of exceptions, at the same time it allows an exception taken by the defendant, and directs the Master to review his report generally, to order the defendant to pay a sum of money into Court, if it is satisfied that ultimately that sum will be found due from the defendant.

UNDER a decree directing intricate partnership accounts to be taken, the Master made a report, according to which a very large sum would have been due from the defendant; and exceptions were taken by both parties.

Some of the exceptions having been argued, Lord ELDON made an order, which, after allowing one of the exceptions, and declaring that it was unnecessary to pronounce any judgment on the other exceptions, referred it back to the Master to review his report, and directed that the defendant should pay into Court upwards of 18,000*l*.

There was no notice of motion for payment of money into Court.

A motion was made on behalf of the defendant, that the order for the payment of the money into Court might be discharged.

† *London Syndicate v. Lord* (1878) 8 Ch. D. 84.

1827.

April.

Lord
ELDON, L.C.

1827.

Nov. 3, 5.

1828.

May,

June,

July,

July 3.

Lord
LYNDHURST,
L.C.

[126]

BROWN
 DE TASTET.
 c.

Mr. Heald, Mr. Pepys, and Mr. Koe, in support of the motion, contended that it was contrary to established practice to order money to be paid into Court, when exceptions were allowed, and the Master was directed to review his report generally. The report not being confirmed, there was no ground upon which the order could proceed; and such an order could not be made, even if it were right in substance, unless upon motion, or at the hearing on further directions.

[127]

Mr. Horne and Mr. Pemberton, contra :

The order was right in substance; because Lord ELDON, though he could not confirm the report, was satisfied that ultimately a much larger balance would be found due from the defendant; and it was competent to the Court, on hearing exceptions, to make any order which the justice of the case might require. In the present case, considering the advanced age of the defendant, and the great delay which would necessarily occur in reviewing the report, it was reasonable that a sum, which, in every view of the accounts, would belong to the plaintiff, should be secured in the meantime.

The LORD CHANCELLOR held that the order was not irregular, and refused the motion.

Afterwards the order on the exceptions was reheard upon the merits.

The LORD CHANCELLOR stated, that he was unable, in the present stage of the cause, to arrive at any safe conclusion with respect to the probable result of the accounts on the principle on which the Master was now to proceed in taking them; and he therefore reversed so much of Lord ELDON's order as directed the money to be paid into Court.

PHIPPS *v.* LORD ENNISMORE.†

(4 Russ. 131—141.)

A. being tenant for life of certain premises, with a power of limiting a jointure to his wife, a settlement is executed on his marriage, by which he demises the lands, of which he was tenant for life, to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin-money during the coverture, and he limits a jointure to her after his death; the same parties on the same day execute another instrument, by which A. covenants not to sell or incumber the lands comprised in the term, and it is declared, that, if he shall at any time sell or incumber them, or attempt so to do, the trustees of the term shall receive the rents and profits, and apply them, as they may think fit, for the maintenance and support of A. or his wife or children or issue: the covenant and this proviso are fraudulent and void as against a subsequent incumbrancer of A.'s life estate.

JOHN BALDERS by his last will devised his manors, lands, and tenements in certain parishes in the County of Norfolk, subject to a term of 500 years, and the payment of certain annuities, to his son Charles Morley Balders and his assigns during his life, with power to limit or appoint them, or any part of them, for a jointure to a wife. The trusts of the term were to pay 100*l.* a year to Charles Morley Balders, till he attained the age of twenty-one, and then 200*l.* a year, till he attained the age of thirty; and to raise the sum of 3,000*l.* and another sum of 2,000*l.* for the testator's daughter. Charles Morley Balders completed his thirtieth year on the 16th of April, 1801.

In 1803, previous to and in consideration of a marriage then intended between Charles Morley Balders and Mary Hare, a daughter of Lord Ennismore, an indenture, bearing date the 15th of January, was executed by Charles Morley Balders of the first part, Lord Ennismore and his daughter of the second part, and trustees of the third part, by which, after reciting that Lord Ennismore had paid 9,200*l.* to the trustees, it was declared that 6,200*l.*, part of that sum, was to be paid to Balders for his own use, and the remaining 3,000*l.* was to be invested in the public stocks, or on the security of the term

1827.

Nov. 8.

1829.

Feb. 4.

Lord
LYNDHURST,
L.C.

[131]

† Explained by WOOD, V.-C., in *Knight v. Brown*, 7 Jur. (N. S.) 894; 30 L. J. Ch. 649, as a device with intent to defraud. A proviso deter-

mining a settlor's interest upon alienation is not necessarily void: *In re Brewer's Settlement*, '96, 2 Ch. 503; 65 L. J. Ch. 821.—O. A. S.

PHIPPS
 LORD
 ENNISMORE.
 [*132]

of 500 years, upon certain trusts for the *husband and wife, and the issue of the marriage. By the same deed Charles Morley Balders demised the premises, of which he was tenant for life, to the trustees for a term of ninety-nine years, in order to secure the payment of 300*l.* a year as pin-money to Mary Hare, to her separate use during the joint lives of himself and her; and he limited a jointure to her in the event of her surviving him.

The same parties, on the same day, executed another indenture, by which, (after reciting, that, inasmuch as doubts might be entertained with respect to the sufficiency of the term of 500 years as a security for the 3,000*l.*, provision should be made, out of the surplus rents and profits of the premises, after payment of the 300*l.* a year to Mary Hare, for the eventual deficiency of that security by an extension of the trusts of the term of ninety-nine years, and that it was agreed that Charles Morley Balders should enter into engagements restraining himself from alienating, charging, or encumbering his life estate or interest in the premises,) he, Charles Morley Balders, for himself, his heirs, &c. did covenant with Richard Viscount Bantry, Richard Hare, William Henry Hare, and John Jones (the trustees), their executors, administrators, and assigns, "that, in case the marriage should take effect, he should not nor would at any time during his life sell, mortgage, charge, or in any manner encumber the manor and premises in the indenture of even date therewith granted and demised, with any sum or sums of money, either annual or in gross, or in any other manner whatsoever; and it was thereby agreed and declared between the parties, that, if he, Charles Morley Balders, should at any time sell, mortgage, charge, or in anywise encumber the said manors and premises, or any of them, or attempt so to do, or execute, or attempt to do or execute any act, whereby the same *should be vested in any other person, then and in such case the trustees for the time being of the term of ninety-nine years should receive the rents, issues, and profits of the hereditaments and premises comprised in the term of ninety-nine years, and after satisfying the annual sum of 300*l.*, being the pin-money of Mary Hare,

[*133]

should pay and apply the same rents, issues, and profits in such manner as they should think proper for the maintenance and support of Charles Morley Balders, or his wife, or children, or issue; and further, that, in case the security intended to be made of the residue of the term of 500 years should, in the opinion of the trustees or trustee for the time being, prove defective and inadequate for all or any part of such portion of the sum of 3,000*l.*, if any, as should be lent thereon, whereby the loss of any part thereof should be sustained, or should be apprehended by the trustees or trustee, then that the trustees, or the survivor of them, &c. might receive all the rents, issues, and profits of the said premises, over and above the 300*l.* a year directed to be paid to Mary Hare, and should pay and apply such yearly sum as to them the trustees should seem proper, not exceeding in the whole one third part of such surplus of the clear yearly rents, issues, and profits of the said premises, unto and for the personal maintenance and support of C. M. Balders, and his wife and family, as the trustees should in their or his discretion think proper; and upon further trust from time to time to lay out and invest the ultimate residue or surplus of such yearly rents, issues, and profits of the premises, other than such parts thereof as should be necessary for effecting and keeping on foot a certain insurance on the life of Charles Morley Balders, in the public stocks or funds, or on real or Government securities, at interest in the names of the trustees; and, in like manner, from time to time to lay out and invest *the dividends, interest, and annual produce of such money, stocks, funds, and securities in their names, in order to accumulate in the nature of compound interest, until the monies, so to be from time to time invested, should amount to a sum equal to that which should have been originally advanced upon the security of the term of 500 years, or so much thereof as should not be actually received by virtue of that security." The indenture contained also a declaration, that the trustees, and the survivor of them, his executors and administrators, should stand possessed of and interested in such accumulated fund, and the dividends, interest, and annual produce thereof, from the time such accumulations

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should cease, as a security for the sum of 3,000*l.* and the interest thereof, and subject thereto, in trust for Charles Morley Balders, his executors, administrators, and assigns.

The marriage was solemnized; and several children were the fruit of it.

In February and June, 1810, Charles Morley Balders granted, for valuable consideration, to the Albion Insurance Company, two redeemable annuities—the one, of 485*l.*,—the other, of 258*l.*,—charged on the lands of which he was tenant for life under his father's will; and, to secure the payment of the annuities, he demised the lands to a trustee for ninety-nine years.

The annuities having fallen into arrear to the amount of more than 2,000*l.*, the Albion Insurance Company, by their secretary and trustees, filed, in 1814, a bill, praying that the indenture of settlement and the deed of covenant, dated respectively the 15th of January, 1803, might, so far as respected the interest reserved to Balders, be declared fraudulent and void.

[135]

Pending the suit, Balders died.

By the decree, made at the original hearing, the VICE-CHANCELLOR directed the Master to inquire what sums of money the trustees of Mr. Balder's settlement had received since the filing of the bill, in respect of rents and profits of the premises accrued due before that gentleman's death, and how those sums of money had been applied.

By the Master's report it appeared, that considerable sums, out of the rents and profits of the premises, had been applied by the trustees to the education and maintenance of the children of Charles Morley Balders, and in making payments for his personal benefit.

By the decree made by the VICE-CHANCELLOR on further directions, it was declared, "that the trustees were not entitled to be allowed, out of the monies received by them, any sums of money paid or allowed by them, which were for the personal benefit of Charles Morley Balders, or for the maintenance and education of his children." And it was ordered, "that the Master should ascertain, whether any, and which of the sums mentioned in the schedules to his report as paid or allowed by the trustees, were to be considered as paid or allowed for the

personal benefit of Charles Morley Balders, and that the Master should disallow the same, and also the sums alleged to have been paid for the maintenance and education of the children."

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v.
LORD
ENNISMORE.

The trustees and the children appealed against so much of the decree as contained this declaration, and the directions founded upon it.

The question was, Whether the second deed of the 15th of January, 1803, was valid as against an incumbrancer, so far as it provided that, if Balders sold or incumbered his life interest, it should be lawful for the trustees of the term, created by the first deed of the same date, to apply the rents and profits, after paying Mrs. Balders's pin-money, to the maintenance and support of Mr. Balders, or his wife or children, in such manner as they should think proper.

[136]

Mr. Sugden and Mr. Wilbraham, for the appellants :

* * Even if the proviso could not be sustained, so far as the trust, which it raises, might be for the benefit of Balders himself, on what ground can it be impeached, so far as it stipulates for a benefit to his wife and children? If the covenant had been merely, that, in the event of alienation by Balders, the trustees should apply the rents to the maintenance of his wife and children, or accumulate them as a further provision for those individuals, it must unquestionably have been sustained. What difference does it make, that a discretionary power is given to the trustees, to exercise their trust in favour of Balders himself? If such a trust in his favour be void, if he is not capable of taking the benefit of it, the only consequence is, that the trustees are bound to exercise the trust in favour of such of the objects of it as are capable: *Alexander v. Alexander*,† *Routledge v. Dorril*.‡

[*137]

The circumstance of the covenant being contained in a distinct deed from that which secures the pin-money to the wife and creates the term of ninety-nine years, is no ground of objection. It matters not whether the stipulations, which constitute the marriage settlement, be embodied in one instrument or in two instruments. If the covenant would have been valid, supposing

† 2 Ves. Sen. 640.

‡ 2 R. R. 250 (2 Ves. Jr. 357).

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LORD
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it to have been inserted in the deed which secures the wife's pin-money, it must be equally valid in its present form. There was no intention of fraud in the parties; there could be no such intention; and if blame is to be imputed any where, it must fall upon the insurance company, who chose to advance their money without making any application to the trustees of the settlement, or using any diligence to discover the nature of Balders's interest in the property.

Mr. Heald, Mr. Bickersteth, and Mr. Daniel, contra :

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* * This covenant is fraudulent within the 27th Eliz. c. 4, s. 5;† it is tantamount to a reservation of a power of revocation of the existing estate in the *land: *Lavender v. Blackstone*,‡ *Tarback v. Marbury*.§

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The covenant would have been void, even if it had been inserted in the deed creating the term; but the circumstance of its being made the subject of a separate instrument stamps the character of fraud more unequivocally on the transaction. Balders is enabled to produce what appeared to be a complete marriage settlement, making a reasonable provision for his wife out of his life estate and by the exercise of his power of jointure. Nothing is to be found in that deed which could suggest to any person the probability of the existence of a further charge on the husband's life estate, created in consideration of the marriage and the wife's portion: it seems to contain all the stipulations and advantages which the wife and her relations had bargained for: and the benefits thereby secured to her and her children, would naturally be presumed to be all that was purchased by the marriage and the payment of her portion. The most prudent and wary purchaser, dealing with Balders, could not look further. * * *

Mr. Sugden, in reply :

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This covenant has no analogy to a power of revocation. Even if it were considered as a power, yet it would be *a power reserved, not to the settlor, but to the trustees; or, at least, it is a power not to be exercised without their consent. The cases in

† Repealed S. L. Rev. Act, 1863;
56 & 57 Vict. c. 21.

‡ 2 Lev. 146.
§ 2 Vern. 510.

bankruptcy have no application to the question; both because the decisions in bankruptcy proceed on particular principles, and, also, because here the contest of the prior purchaser is not with assignees, and a general body of creditors claiming under the operation of law, but with subsequent purchasers, whose only title is under the deed of the same party under whom he claims. The two deeds of the 15th of January, 1803, formed together a reasonable settlement; and this Court cannot strike out any of the stipulations which the wife and her father purchased for the benefit of herself and her children, and for which they paid, not merely a sum of money, but the highest consideration known to the law.

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v.
LORD
ENNISMORE.

THE LORD CHANCELLOR :

1829.
Feb. 4.

The question in this cause is, Whether, in a transaction of such a kind as appears in these pleadings, Balders could charge this property with the payment of the annuities granted to the Albion Insurance Company; or, is the provision in the second deed to have effect, so as to defeat the securities given for the payment of the annuities?

The case was argued as to two points. It was said, first, that the provision enabling the trustees to apply the rents and profits to the maintenance of Balders himself, was sustainable; and, secondly, that, assuming that the provision enabling the trustees to apply the rents and profits for the maintenance of Balders himself could not be sustained as against the incumbrancer, yet the Court would sustain it so far as regards the application of those rents and profits to the maintenance of the wife and children *of Mr. Balders. The first point was not much pressed, and seems to me free from all reasonable doubt. The transaction, in that respect, cannot be sustained. Balders has a life-interest in certain property; having that life-interest, can it be contended, that he can enter into a covenant—a private deed—with his own trustees, that he shall not incumber his interest in the property, and that, if he does incumber it—if, for instance, he sells it for valuable consideration,—the effect is to be, that the purchaser shall not be entitled to possess what he has bought, but that Balders

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v.
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ENNISMORE.

himself, subject to the discretion of his trustees, and under their direction, shall continue to enjoy the rents and profits, as if the alienation had not taken place? In point of law, such a transaction cannot be sustained.

The only question which admits of doubt, is, Whether the provision can be sustained against the incumbrancer, so far as regards the application of the rents and profits to the maintenance of the wife and children? It was admitted on all hands, that the parties to the deed did not contemplate a fraud; but the transaction is in its very nature fraudulent. Though the parties had no fraud in view, the deeds themselves are fraudulent. If the tenant for life procured any person to advance money to him on the security of the property, in that event, and in that event only, was the instrument in question to have operation. In point of law, the deed cannot be sustained. I concur, therefore, with the judgment of the VICE-CHANCELLOR.

The question was before Lord Eldon on a motion; and, though he did not express a decisive opinion, I collect that he concurred in the view which I have taken of the case.

Appeal dismissed.

FURNIVAL v. BOGLE.†

(4 Russ. 142—154; S. C. 6 L. J. Ch. 91.)

1827.
Nov. 3, 10, 14,
21, 28.

Dec. 11.

Lord
LYNDHURST,
L.C.

[142]

A party is bound by the consent of his counsel given in Court, though they had no instructions to consent, if they were at the time apprised of all those facts, of which the knowledge was essential to the proper exercise of their discretion; but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances.

How far a party will be affected by the remissness of his solicitor in not immediately objecting to an order made by the consent of counsel in Court, when neither the party nor his solicitor was present, and instructions to consent had not been given by either.

ACCORDING to the allegations of the bill, the defendant Robertson, having pledged two thousand shares in "The British Rock and Patent Salt Company" for 12,000*l.*, applied to the plaintiff to lend him his acceptances to the amount of 12,700*l.*;

† *Hickman v. Berens*, '95, 2 Ch. 638, 64 L. J. Ch. 785; *Ainsworth v. Wilding*, '96, 1 Ch. 673, 65 L. J. Ch. 432.

stating, at the same time, that he had friends in Scotland, who, upon the plaintiff's acceptances, and a deposit of the shares, would advance 12,000*l.*, the sum necessary for redeeming them, provided the shares were also made a security to them for an old debt of 3,000*l.* The plaintiff agreed to accept the bills, on condition that the proceeds of the two thousand shares should be chargeable first with the payment of the advance of 12,000*l.*, for which the plaintiff's acceptances were to be a collateral security, and should not be applied in satisfaction of the debt of 3,000*l.*, till after this advance of 12,000*l.* was repaid. The friends in Scotland, who were to advance the 12,000*l.*, were the defendants H. and A. Bogle.

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BOGLE.

The bill stated, that, in pursuance of this arrangement, the plaintiff accepted the bills for 12,700*l.*, and handed them over to the agent of Messrs. Bogle, upon *a written undertaking of the agent not to part with the proceeds of the bills, till the plaintiff had approved of the deed which was to be executed by Robertson and the Messrs. Bogle; that, in violation of this undertaking, the agent transmitted the acceptances to Messrs. Bogle; that a deed was executed by them and Robertson, without the plaintiff's knowledge or consent, by which the shares, instead of being made a security, according to the alleged agreement with the plaintiff, first, for the 12,000*l.* collaterally secured by his acceptances, and, subject thereto, for the old debt of 3,000*l.*, were made a security in the first instance for this old debt of 3,000*l.*, and after satisfaction of that debt, for the due payment of the acceptances: that Robertson had not taken up the bills; that the plaintiff, having 26,000*l.* in the hands of two others of the defendants in the city of London, the Messrs. Bogle had attached it by means of proceedings in the Lord Mayor's Court; that the two thousand shares were worth considerably less than 15,000*l.*, though worth more than 3,000*l.*; and that the object and intention of the Messrs. Bogle was to make the shares available, in the first instance, for payment of their old debt of 3,000*l.*, instead of applying them, first, according to the original agreement, in payment of the plaintiff's acceptances.

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The prayer was that the defendants, the Messrs. Bogle,

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v.
BOGLE.

[*144]

might be restrained from prosecuting the attachment, or bringing or carrying on any action or proceedings in the Mayor's Court, or in any other Court, against the plaintiff or the garnishees, upon or in respect of his acceptances, and from negotiating them; that it might be declared, that the plaintiff was entitled to have the two thousand shares applied in payment of the bills, and towards his indemnity, and that he was not liable to pay more in respect of the bills, than so much of the amount due thereon as the proceeds of the *two thousand shares might fall short of satisfying; that the defendant Robertson might be compelled to indemnify the plaintiff against the bills and all the consequences thereof, and particularly against the proceedings in the Mayor's Court; that the garnishees might be restrained from paying the 26,000*l.*, or any part of it, to the Bogles, or otherwise than to the plaintiff; and that it might be declared, that the plaintiff was not liable to pay the 3,000*l.*, or any part thereof, and that the same was not a charge upon the two thousand shares, otherwise than secondarily, after the acceptances were paid: the plaintiff offering, as between him and the Bogles, to pay so much of the amount due upon the bills of exchange, as the two thousand shares might not be sufficient to satisfy.

An injunction was obtained to stay the proceedings in the Mayor's Court, and 13,000*l.* was paid into the Court of Chancery by the garnishees.

The defendants, the Bogles, having put in their answer, by which they denied the equity stated in the bill, gave notice of motion, that the 13,000*l.* might be paid out of Court to them, or that the injunction might be dissolved.

On Saturday, the 3rd of November, *Mr. Sugden*, on beginning to open this motion on behalf of the Bogles, proposed that an order should be made by consent, on terms which he stated. The most material of the terms were, that the money in Court should be paid to the Messrs. Bogle, and that the shares should not be brought immediately into the market. *Mr. Heald*, the leading counsel for the plaintiff, expressed his opinion, that the offer was fair and reasonable; but, as *Mr. K.*, the solicitor who instructed him, was not *in Court, he requested time to consider

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v.
BOGLE.

whether he should accede to it or not. *Mr. Sugden* declined to grant any postponement; stating, that if his offer were not accepted, he must forthwith proceed adversely. The counsel for the plaintiff then acceded to the offer; and the order was made, by consent, on the proposed terms, in the presence of Mr. K.'s clerk.

On Tuesday, the 6th of November, the plaintiff discharged Mr. K. from being his solicitor; and immediately gave notice of motion, that the order by consent might not be drawn up, and that the Messrs. Bogle might be at liberty to proceed upon their original notice of motion as they should be advised.

Nov. 10.

Mr. Heald, *Mr. Knight*, and *Mr. Rotch*, in support of the application, stated, that the arrangement had been entered into under the notion that Mr. Furnival deemed it to be for his advantage that the sale of the shares should not be pressed; whereas it turned out that he would much rather that the shares should be sold forthwith, than that the proposed order should stand. The Court would not bind him by an order which his counsel had acceded to, without communication with him, and in the absence of his solicitor, and without instructions either from him or his solicitor, and which he had repudiated as soon as it came to his knowledge.

Mr. Sugden, *contra* :

Cited *Mole v. Smith*,† where Lord ELDON said that it was for counsel to consider whether they were authorized to consent, and that, if they did consent, the party would be bound.

THE LORD CHANCELLOR :

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I must consider the case as if Mr. Furnival's solicitor, Mr. K., had been in Court, and assented to the order. His clerk was in Court, when *Mr. Sugden* made the proposition; some communication took place between *Mr. Heald* and him. He did not object to the arrangement, and I must presume that he immediately communicated what had occurred to his principal K. It

† 1 J. & W. 673. [The passage here quoted is the only passage in the case which bears upon this point.—O. A. S.]

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BOGLE.

was the duty of the solicitor, if he dissented from the order, to have given immediate notice of his objection. Saturday and Monday elapsed: on Tuesday morning a new solicitor is appointed, and then, for the first time, an objection is made to the order. If Mr. K. had been in Court, and had assented to the arrangement, it would have bound his client. He has adopted it; for it was communicated to him, and he did not object to it. The client must, therefore, be bound.

If Mr. Furnival had not made an accurate statement of the facts to Mr. K., it would perhaps have been too much to have bound him by the order; and he might have been let loose from it on proper terms. But there is nothing before me to shew, that K. was not accurately informed of the circumstances of the case.

It is said that there were material facts, which were not communicated to counsel. But that is a new suggestion. There is no evidence that the counsel were not in possession of all the facts necessary to be known, in order to enable them to exercise a sound discretion.

Nov. 14.
—

Mr. Heald applied to the Lord Chancellor to suspend the passing of the order, till Mr. Furnival could renew his motion on further affidavits, which, it was stated, would shew, that his counsel, when they consented to the order, had not the facts fully before them.

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An intimation having been given on the preceding day, to the solicitor of the Messrs. Bogle, that such an application would be made, *Mr. Sugden* appeared to oppose it.

THE LORD CHANCELLOR :

I think that, under all the circumstances of the case, an opportunity ought to be afforded to Mr. Furnival, of discussing the question, whether he is to be bound by the order which has been made. Mr. Furnival supposed that, on his application, stating that counsel were not authorized to consent to the order, the Court would suffer the subject to be again gone into; and he therefore did not, on the former occasion, introduce all the

circumstances, which, it now appears, he might have brought forward. If it had been then shewn, that counsel, when they exercised their discretion, had not those materials before them, on which a correct judgment might be formed, the decision of the Court might have been different. It is stated that there is now evidence on affidavit, which establishes, or goes far to establish, that point. I therefore think myself bound to suspend the drawing up of the order, till the case can be considered in the new form in which Mr. Furnival wishes to present it to the Court; and I do so with the less reluctance, because no inconvenience can arise to the other party from this short delay.

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BOGLE.

Mr. Furnival was ordered to pay the costs of the appearance of the Messrs. Bogle on this occasion, though no notice of motion had been given.

Mr. Knight and Mr. Rotch renewed the motion on behalf of the plaintiff.

Nor. 21.

The circumstances on which they relied are stated in the judgment of the LORD CHANCELLOR.

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Mr. Sugden, contra :

Contended that the circumstances alluded to, even if they could be considered material, were all known to the solicitor, and that, the solicitor having, with a full knowledge of the facts, acquiesced in the arrangement, Mr. Furnival was bound.

THE LORD CHANCELLOR :

It now appears that a proposition, similar to that which is embodied in the consent order, had been made to Mr. Furnival at an earlier stage of the business, and had been positively rejected by him; that it was afterwards renewed, but no answer was then given on his behalf; and that he long since instructed his solicitor to use his utmost exertions to prevent Messrs. Bogle from getting the money out of Court. If Mr. Furnival had been in Court, when *Mr. Sugden* made his proposition, I have no doubt that he would have prevented the arrangement from being acceded to; and if the circumstances, to which I have

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referred, had been communicated to his counsel, they would not have assented to the order: for it is quite impossible that they should have considered themselves justified in acceding, in the absence of Mr. Furnival and his solicitor, to the proposal of the Messrs. Bogle, had they been aware that a similar offer had been before made to him, and rejected; that, upon its being renewed, he returned no answer, which amounted to a second rejection; and that he had desired the utmost activity to be used, in order to prevent the money from being taken out of Court. Mr. Furnival's counsel, therefore, at the time when they assented to the arrangement, were not apprised of facts, the knowledge of which was essential in reference *to the question on which they were to exercise their discretion.

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There is another point on which I have more difficulty. If the solicitor had been present in Court, and had known all those facts, the party would have been bound by his consent. Here the solicitor K. was not present; and the question is, whether K.'s subsequent conduct has fixed Mr. Furnival with an agreement, which, independently of K.'s conduct, would not be binding on the client.

Mr. K., it appears, knew nothing of the arrangement, till after the rising of the Court on Saturday, the 3rd of November: he expected Mr. Furnival to arrive in London on Monday morning; but, on Monday, a letter was received from Mr. Furnival, stating that he would not arrive till the following day. Under these circumstances, the solicitor thought it better to wait till Mr. Furnival arrived in London, than to take any immediate step to stay the progress of an order, which, he knew, could not be drawn up before Tuesday. It would have been better, if Mr. K. had interposed immediately; but there has not been so much remissness on his part, as to make the arrangement binding on Furnival, who, as soon as he came to town, manifested the strongest dissatisfaction with the course which had been pursued, and appointed another gentleman his solicitor.

I think, therefore, that Mr. Furnival ought to be placed in the same situation, as if the arrangement had not been made. And I am the more disposed to come to this conclusion, because, though the Messrs. Bogle will lose the benefit of the order, they

will not lose any advantage which the merits of their case entitle them to, or which they could have obtained, if Mr. Furnival had been present. Mr. Furnival, however, must pay the costs of *the consent order and the proceedings to which it has given rise, including the costs of this application.

FURNIVAL
†
BOGLE.

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* * * * *

ATTORNEY-GENERAL v. BUTCHER.†

(4 Russ. 180—181.)

1827.
Nov. 23.

Lord
LYNDHURST,
L.C.

[180]

Where there is a fair and substantial question to be argued on appeal, the decree may be varied as to costs, though affirmed in every other point; but it will not be varied as to costs, where the point, which is presented as the ground of appeal, has no substance.

ON an appeal from a decree of the MASTER OF THE ROLLS, which directed costs to be paid by the defendants, the LORD CHANCELLOR was of opinion that there was no ground for varying the order in the principal point complained of. But the appellants contended, that, even if the substantial part of the decree was right, the circumstances of the case were such that costs ought not to have been given against the defendants; and though they could not have appealed on the ground of costs being improperly given, yet, as there was an appeal on another point, the decree, though not varied in that other point, ought to be rectified in the direction as to payment of costs.

Mr. Blunt, for the appellants. * * *

THE LORD CHANCELLOR:

[181]

The rule is, that you cannot appeal for costs alone. But if a party appeals, having a substantial ground of appeal, and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the costs, though he does not succeed on the substantial ground of appeal, but if a point is brought forward as a ground of appeal, which, on the slightest consideration, appears to have

† *Harris v. Auron* (1877) 4 Ch. Div. 749, 46 L. J. Ch. 488.

ATT.-GEN. no substance, it would be too much to vary the decree as to
 BUTCHER. costs. A point is not to be put forward as a ground of appeal
 merely for the purpose of covering an appeal on the question
 of costs. I consider this to be in substance an appeal for costs
 only; I must, therefore, refuse to vary the decree as to costs.

Appeal dismissed with costs.

IN RE HOLMES.

(4 Russ. 182—187.)

1827.
 Nov. 26.
 Dec. 13.

Lord
 LYNDBURST,
 L.C.
 [182]

Under a commission of lunacy, the jury found, "that the party is not a lunatic, but that, partly from paralysis and partly from old age, his memory is so much impaired as to render him incompetent to the management of his affairs, and, consequently, of unsound mind, and that he has been so for the term of two years last past:—"The inquisition was quashed, and a new commission was ordered to issue.

The Court will protect the property of a supposed lunatic in the interval between the presenting of a petition for a commission of lunacy, and the finding of the jury; but it will, at the same time, take care, that ample means for resisting the commission be furnished to those who act, in the inquiry, on the alleged lunatic's behalf.

UNDER a commission of lunacy, which had issued against Mr. Holmes, the jury found "that the Rev. William Holmes is not a lunatic, but that, partly from paralysis and partly from old age, his memory is so much impaired, as to render him incompetent to the management of his affairs, and consequently of unsound mind, and that he has been so for the term of two years last past."

Upon this finding, a petition was presented by the daughter and only child of the alleged lunatic for the appointment of a committee.

A cross petition was presented in the name of Mr. Holmes, but in reality by his wife, praying that the inquisition might be quashed.

Mr. Horne, and Mr. Wright, for the supposed lunatic:

This verdict is no answer to the inquiry which the jury were directed to make. The only fact, which the jury have found, is, that, partly from paralysis and partly from old age,

Mr. Holmes's memory is so much impaired, as to render him incompetent to the management of his affairs. * * The statute *De Prerogativa Regis* and the old authorities shew, that persons in the situation, in which this gentleman appears to be, were not intended to be the objects of a commission of lunacy.

In re
HOLMES.
[183]

THE LORD CHANCELLOR:

It is not necessary to go back to old authorities. We have the law, as it is now to be administered, clearly expounded by Lord ELDON in *Ridgeway v. Darwin*.† “I have reason,” says Lord ELDON, “to believe, the Court did not, in Lord Hardwicke's time, grant a commission of lunacy in cases in which it has been since granted. Of late the question has not been, whether the party is absolutely insane; but the Court has thought itself authorized (though certainly many difficult and delicate cases with regard to the liberty of the subject occur upon that) to issue the commission, provided it is made out that the party is unable to act with any proper and provident management, liable to be robbed by any one, under that imbecility of mind not strictly insanity, but, as to the mischief, calling for as much protection as actual insanity.” He adds—“Finding, when I came here, a course of cases establishing this authority, and feeling a strong inclination to maintain it, or that the Legislature should take measures to preserve persons in a state of imbecility, laying them as open to mischief as insanity; till those decisions are reviewed, I will not alter them.” The law, thus stated by Lord ELDON, has been acted upon for years: it has been acted upon in the view of the Legislature: the Legislature has not thought proper to interpose; and we must, therefore, take the law to be as thus expounded.

Mr. Sugden, Mr. Phillimore, and Mr. Clinton, in support of the inquisition: [184]

* * It is impossible to mistake what the object of the jury was. They wished to find that he was of unsound mind, [185]

† 6 R. R. 227, 228 (8 Ves. 65, 66, 67).

In re
HOLMES.

so as to render him a fit object for the protection of this Court; at the same time, they wished to negative that species of unsoundness commonly called lunacy. Their anxiety was to point out the nature and origin of the mental unsoundness under which this gentleman labours.

Mr. Horne, in reply.

THE LORD CHANCELLOR :

I think it unsafe that this verdict should stand. The finding here is very similar to what was found in *Cranmer's* case (12 Ves. 445). There the verdict was, "that Henry Cranmer is so far debilitated in his mind as to be incapable of the general management of his affairs." What did Lord ERSKINE say on that occasion? "How can I tell, what is *so far* debilitated in his mind, as not to be equal to the general management of his affairs? Suppose he was a farmer, and his understanding was so far debilitated that he could not manage his farm, though competent to common purposes." What are the affairs to the management of which he is incompetent? Those affairs may be of such a nature, that a certain degree of impairment of memory may render him incompetent to the management of them, and yet he may not be of unsound mind.

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Here the jury, having merely found generally, that, partly from paralysis and partly from old age, this gentleman's memory is so much impaired as to render him incompetent to the management of his affairs, go on to say, "and consequently he is of unsound mind." I am not satisfied that the consequence follows necessarily from these premises; and, unless I were satisfied that the consequence does follow necessarily, I cannot allow the verdict to stand.

A new commission must issue.

Dec. 13.

A few days afterwards a petition was presented in the name of Mr. Holmes, stating that the parties, who had applied for the commission of lunacy, had caused a *distringas* to be issued out of the Exchequer, by which he was deprived of the disposal

of stock standing in his name; and that they had also given notice to his tenants not to pay the rents to him or his agents. The prayer was, that they might be directed to withdraw their notices, and might be restrained from intermeddling with his property; and that such order as was just might be made with respect to the *distringas*.

In re
HOLMES.

Mr. Horne in support of the petition, contended, that, until Mr. Holmes was found a lunatic, neither the Court nor any individual had a right to interfere with him in the disposition of his property. The measures, which had been adopted, would deprive him of the means of effectually resisting the new commission.

Mr. Sugden, *contra* :

* * We have no wish to deprive those, who resist the commission, of the pecuniary means which may be fairly wanted for that purpose.

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THE LORD CHANCELLOR :

It is absolutely necessary that the friends of Mr. Holmes should have the pecuniary means of resisting the commission; but, at the same time, his fortune must be preserved from all improper interference. It is the duty of the Court to protect his property. The best course will be for the parties to make some arrangement, by which, while ample means for conducting the inquiry are furnished, the property will remain secured.

There will be no objection, on the part of those who prosecute the commission, to withdraw the notices to the tenants; and the amount of the rents will probably be sufficient for the purposes of Mr. Holmes, or those who act in his name. If that will be sufficient, I certainly think it better that the money in the funds should not be touched, unless it is wanted for some particular purpose.

On the inquisition held under the second commission, the jury found that

Mr. Holmes was of unsound mind.

1827.
Dec. 8.

Lord
LYNDHURST,
L.C.

[191]

HUGHES v. BIDDULPH.†

(4 Russ. 190—192.)

Documents privileged from production in a suit.

In this case the LORD CHANCELLOR stated his opinion to be, that confidential communications between a defendant and her solicitors, or between the country solicitor and the town solicitor, made in their relation of client and solicitors, either during the cause or with reference to it, though previous to its commencement, ought to be protected; but that all other papers ought to be produced.

DIMES v. SCOTT.‡

(4 Russ. 195—209.)

1824.
Aug. 19.

Rolls Court.
GIFFORD,
M.R.

On Appeal.

1827.

Dec. 7.

1828.

April 15.

Lord
LYNDHURST,
L.C.

[195]

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in Government or real securities, of which they were to stand possessed, upon trust for A. during her life, and, after her death, for B. The trustees permitted a share, which the testator had in an Indian loan, bearing interest at 10*l.* per cent., to remain for several years on that security, during which time they paid to A. the interest at 10*l.* per cent., which it yielded annually; and, the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater, than if the conversion had taken place at the end of a year from the testator's death: Held,

That the tenant for life was not entitled to the actual interest, which the money yielded, while it remained on the Indian security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from the testator's death;

That the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest; and that they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security and invested in the 3 per cent. stock at the end of a year from the testator's death.

CAPTAIN PIERCY, by his will, dated the 24th of September, 1801, bequeathed all his ready money, securities for money, and

+ *Minet v. Morgan* (1873) L. R. 8 Ch. 361, 367; 42 L. J. Ch. 627.

‡ And so conversely in the case of a reversion remaining unsold, the tenant for life may claim an apportionment of the proceeds when

received: *Earl of Chesterfield's Trusts* (1883) 24 Ch. D. 643; 52 L. J. Ch. 958; unless a contrary intention is shewn by the will: *In re Pitcairn*, '96, 2 Ch. 199, 65 L. J. Ch. 120.—O. A. S.

his personal estate and effects not thereinbefore
 lly disposed of, unto John Atkins and John Corderoy,
 st to convert the same into money, and thereout to pay
 and funeral and testamentary expenses, and to stand
 of, and interested in, the residue of the money to arise
 a duced by his estate and effects, in trust, to place out
 or the same in or upon Government or real securities, as
 to as trustees should seem meet, and to stand possessed of and
 interested in the money so to be invested or placed out at interest,
 upon trust, after paying certain annuities, to pay the interest,
 dividends, and annual produce to his wife Mary during her life ;
 and, after her decease, to stand possessed of the principal, in
 the events which happened, in trust for Elizabeth Wintersgill,
 her executors, administrators, and *assigns ; and he appointed
 Atkins, Corderoy, and his wife Mary, executors of his will.

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 v.
 SCOTT.

[*196]

The testator died on the 30th of January, 1802 ; and, shortly afterwards, his widow and Corderoy proved the will.

Part of Captain Piercy's property, at the time of his death, consisted of a sum of 2,000*l.*, which, when in Calcutta in 1799, he had invested in a fund of the East India Company, called the Decennial Loan. That loan was irredeemable for ten years from the 1st of January, 1800 : it bore interest at the rate of 10*l.* per cent., payable annually, either in cash at Calcutta or by bills drawn upon the directors in London, and payable fifteen months after date. The principal was to be repaid at the end of ten years ; a power, however, being reserved to the Company of postponing the payment for one or two years longer, upon paying, during such additional period, interest at either 10*l.* per cent. or 5*l.* per cent., according as the payment was to be made in India or in London. The shares in the loan were transferable.

Captain Piercy, before he left India, directed the interest on his portion of the loan to be paid to him in London.

The 2,000*l.*, invested in this loan, remained upon that security till 1813, when the principal was paid off and laid out in the purchase of 3*l.* per cent. stock. Corderoy, as executor and trustee, had, during all this time, received the interest, and paid it over to the widow, who had intermarried with a Mr. Scott.

DIMES
 SCOTT.
 [*197]

In June, 1820, Elizabeth Wintersgill, and her husband, filed their bill against the executors of Corderoy *and the widow of the testator for an account of his assets. The bill charged, that "the testator's interest in the Decennial Loan ought, as being a beneficial property, to have been sold, or otherwise the interest ought to have been invested as principal money for the benefit of the testator's estate; and that Mary Scott and Richard Scott, or the personal representatives of Corderoy, ought to be charged with the interest received by Corderoy and Mary Scott in respect of the said loan."

At the hearing, the common accounts were directed. The Master in his report allowed to the executors of Corderoy the payments of the interest on the decennial loan, which Corderoy had made to Mrs. Scott, the tenant for life of the residue.

The plaintiffs excepted to this part of the report, on the ground that "Mary Scott, being only tenant for life of the residue, was not entitled to be paid the interest upon the subscription of 2,000*l.* to the decennial loan, to the prejudice of the plaintiff, who was the person entitled to the residue immediately after the death of Mary Scott; but that the interest upon the said subscription ought, as it became due and was received by Corderoy, to have been considered and treated by him as part of the general residue of the testator's personal estate, and, as such, laid out and invested, as directed by the testator's will, during the life of Mary Scott, and the interest thereof, when so laid out and invested, paid to her during her life."

1824.
August.

Mr. Barber, in support of the exceptions [cited *Howe v. Earl of Dartmouth*,† and other cases].

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Mr. Pemberton, *contra* :

* * The present case has no resemblance to any of the authorities which have been cited: leaseholds and long annuities are a perishing fund; they are yearly diminishing in value: every annual payment consists partly of what is truly a payment of interest, and partly also of what is a repayment of capital. Here the principal was not sustaining any diminution.

† 6 R. R. 96 (7 Ves. 137).

LORD GIFFORD, M. R. :

One principle of the Court is, that, where a testator gives a residue to a person for life, with remainders over, property comprised in that residue, being of a perishable nature, so that the *corpus* is becoming of less value from year to year, must be converted. Another principle is, that, if the residue comprises property of a reversionary nature, that too must be converted. The one rule protects the remainder-man; the other protects the tenant for life. But this is the first case, where the *corpus*, remaining imperishable, has produced, for a limited time, a larger interest than it would have yielded, had it been laid out in England. Here the principal was secure; but it was lent out in a foreign country at a higher rate of interest than could have been obtained at home. The question is, should the excess of interest thus obtained be applied to increase the *corpus* of the fund?

By the terms of the Decennial Loan the securities are transferable, so that it was competent to the executors at any time to have converted it into money. At first I was struck with the difficulty and harshness of compelling executors, who find property of their testator lent out at a higher rate of interest than could be gotten here, to invest it in the 3 per cents. But, on looking at the cases of *Fearns v. Young* and *Howe v. Lord Dartmouth*, and the strong language used by the LORD CHANCELLOR in deciding them, I think myself bound, though the present case is a very hard one, to apply to it the rule which he has laid down. I must say, that these payments to the tenant for life were an improper application of the trust monies.

It was argued, that, whatever might have been the rule, if the legatee in remainder had applied immediately, what the executors had done could not be considered as a breach of trust, which ought to affect them at this distance of time. But the language of this will is imperative. The executors are expressly directed to convert the personal estate into money, which they are to invest in Government or real securities. It is not left to their discretion how they are to act. There is a positive injunction given to them to realize the property. It was the duty of the executors to have sold this debt due from the East India

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r.
SCOTT.
Aug. 19.
[200]

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v.
SCOTT.

Company, and to have invested the money in the 3 per cents.; then the tenant for life would have received only the dividends which the stock so purchased would have produced; and I must, therefore, disallow (though reluctantly) these payments to her, so far as they exceeded the dividends on that amount of 3 per cent. stock.

* * * * *

[202]

In fact, the 2,000*l.*, when paid off by the East India Company in 1813, had been invested in the purchase of 3,375*l.* 10*s.* 6*d.* 3 per cent. stock, which exceeded by 826*l.* 17*s.* 1*d.* the sum which would have been produced, if the conversion had been made at the end of a year from the testator's death. The defendants, therefore, insisted before the Master, that, inasmuch as the order of the MASTER OF THE ROLLS had declared that the subscription to the Decennial Loan ought to have been sold one year after the decease of the testator, they ought to be charged, in their account of the monies come to the hands of Corderoy, only with the stock, and the dividends on the stock, which would have been produced, if the conversion had been then made. The Master was of opinion, that, under the terms of the order of the 19th of August, it was not open to him to vary the sums with which he had charged them in his former report; and he certified, that the testator's subscription in the Decennial Loan, if it had been sold on the 31st of January, 1803, and the proceeds had been invested in *the 3*l.* per cents., would have produced 2,548*l.* 13*s.* 5*d.* stock, which, down to April, 1813, (when the subscription was actually sold and the money invested), would have yielded dividends amounting in all to 764*l.* 11*s.* 8*d.* The Master, therefore, allowed to the executors of Corderoy this sum of 764*l.* 11*s.* 8*d.*, and deducted, from what he had before allowed them, 1,800*l.*, which was the amount of the interest on the Decennial Loan, which had become due after the death of the testator, and been paid to the widow.

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The representatives of Corderoy then presented a petition of appeal from the order of the 19th of August, 1824, praying a declaration, that, in taking the accounts of the assets of the testator, they ought to be charged with such sums only, in respect of the subscription to the Decennial Loan, as it would

have sold for at the end of a year from the testator's death, and as would have accrued for dividends on the amount of 3*l.* per cent. stock, which the money, arising from the sale, if immediately invested, would have produced.

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SCOTT.

Mr. Sugden and Mr. Pemberton, for the appellant :

1827.
Dec. 7.
—

The plaintiffs may either adopt what the executors have done, or may repudiate it; they may either take the result of the actual conversion of the stock, or insist on treating the fund as converted at the end of a year from the testator's death. But they cannot adopt the transaction in one part and for one purpose, and reject it in another part and for another purpose: the adoption or rejection must be of the entire transaction.

* * Had the conversion been made in January, 1803, the plaintiff would have had 2,548*l.* of 3*l.* per cent. stock; the executors, by delaying the conversion, have purchased 3,375*l.* of stock. If this delay be made the ground for throwing a heavy burden on the executors, must not the excess of 3,375*l.* stock above 2,548*l.*, together with the dividends on that excess, be first applied to indemnify them against the consequences of the alleged misconduct which produced such an addition to the fund? It is inconsistent to say, "We shall treat you as if the money had, in 1803, been called in from the Indian security and laid out in stock; and we shall charge you, at the same time, not with the dividends on that stock, but with the interest yielded by the Indian security."

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Mr. Horne and Mr. Barber, contra :

We do not seek to charge the trustees for breach of duty in not converting the testator's property in due time. We charge them only with what they have actually received; and the sole question is, as to the propriety of certain payments which they have made; the disputed items of discharge have nothing to do with any of the items of charge. The order of the MASTER OF THE ROLLS has ascertained that the executors have made some payments improperly; what right can they thereby acquire to apply part of the trust fund in indemnifying themselves against these improper payments? The principle of this appeal is, not

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that they were right in paying the 200*l.* a year to the tenant for life, but that, having made the payments wrongfully, they should be allowed to indemnify themselves out of the accidental profit which accrued to the trust fund by reason of the delay which took place in the conversion of the assets. A trustee or *executor can derive no benefit from his own laches or misconduct: every profit which accrues to the fund, accrues for the benefit of the cestuis que trust; and the rights of the tenant for life cannot be diminished nor increased by the misconduct of the trustee. * * *

THE LORD CHANCELLOR:

The case made by the appeal is, that the plaintiffs seek to charge the executor for a neglect of duty; that, supposing him to have been negligent, he is bound to indemnify the remainder-man against the loss; but that, in consequence of his alleged negligence, the trust fund has increased in value; and though the executor would not be entitled to any advantage from such an increase of the fund, yet that, to the extent of that increase, he would be entitled to indemnify himself for the liability which the suit seeks to throw upon him.

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The plaintiffs present the case to the Court in a very different light. They say that the 10*l.* per cent. interest *on the Decennial Loan was actually received by the executor; that he is chargeable with all the sums which he has received; and that, on the other hand, he is entitled to be allowed in his discharge only such sums as he paid away properly. The question therefore is, Whether there is a fixed rule in this Court which defines the amount of the payments which ought to have been made to the tenant for life, and whether that rule be such as the plaintiffs allege? When a residue is given, as in this will, and a part of it has not been actually converted, are you to consider what the effect would have been, if the fund had been converted? and is the executor to be allowed, in respect of payments to the tenant for life, not the actual income yielded by the property, and paid by him to her, but only such sums as she would have been entitled to receive, if the conversion had taken place in due time? Here, if the

fund had been converted, the tenant for life would have received only the dividends of so much 3*l.* per cent. stock as would have been purchased with the proceeds of the testator's share in the Decennial Loan: the executor has, in truth, paid to her a much larger sum, out of increased profits which were produced by allowing the money to remain in an Indian investment. He has made these payments, it is said, in his own wrong, and cannot be allowed them in his discharge; though, on the other hand, he must be charged with all the sums which he actually received. In that view of the matter, the judgment of the MASTER OF THE ROLLS would be right; and my present impression is, that I must affirm it. I shall, however, take time to consider, whether, in such a case, when the fund has not been actually converted, and has in consequence of that circumstance yielded a larger annual income, the executor is to be charged with all the sums actually received by him, while the allowances to him, in respect of payments to the tenant for life, are to be measured *by the consideration of what she would have received, if the conversion had taken place within a year after the testator's death.

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[*207]

THE LORD CHANCELLOR :

This testator left his property to trustees, who were directed to convert it into money, and to invest the proceeds in Government or real securities; and he gave the interest of the money so to be invested to his widow for life, with remainder to the lady who is one of the present plaintiffs. Part of his property consisted of a sum which he had subscribed to what is called the Decennial Loan. The trustees did not convert his share of this loan into money; but, suffering it to remain as they found it, paid the interest, which was 10*l.* per cent., to the tenant for life. Was that a proper performance of their duty?

1828.
April 15.
—

The directions of the will were most distinct; and, according to the case of *Howe v. Lord Dartmouth*,† and the principles of this Court, it was the duty of the trustees to have sold the property within the usual period after the testator's death.

† 6 R. R. 96 (7 Ves. 137).

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If they neglected to sell it, still, so far as regarded the tenant for life, the property was to be considered as if it had been duly converted. Had the conversion taken place, and the proceeds been invested in that which is considered in this Court as the fit and proper security, namely, 3*l.* per cent. stock, the tenant for life would not have been entitled to more than the interest which would have resulted from such stock. The executor is therefore chargeable with the difference between the interest which the fund, if so converted, would have yielded, and the 10*l.* per cent. which was actually produced by the fund, and was paid over by him to the tenant for life.

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It is said, that, if the subscription to the Decennial Loan had been sold, and the produce invested in stock at the end of a year from the testator's death, the sale would have been much less advantageous to the estate than the course which has been actually followed; and that, if the executor is to be charged for not having made the conversion at the proper time, he ought, on the other hand, to have the benefit of the advantage which has accrued from his course of conduct. The answer is this: With respect to the principal sum, at whatever period the subscription to the Decennial Loan was sold, the estate must have the whole amount of the stock that was bought; and if it was sold at a later period than the rules of the Court require, the executor is not entitled to any accidental advantage thence arising. As to the payments to the tenant for life, the executors are entitled to have credit only for the sums I have adverted to, namely, the dividends on so much 3*l.* per cent. stock as would have been purchased with the proceeds of the subscription to the Decennial Loan, if the conversion had taken place at the proper time. On the other hand, he is chargeable with the whole of the difference between the amount of those dividends and the amount of the sums which have been received in respect of interest on the money which was continued in the Decennial Loan. I think, therefore, that the judgment of the MASTER OF THE ROLLS must be affirmed.

Mr. Sugden submitted that the tenant for life was entitled

to the actual interest produced by the investment in the Decennial Loan till the time when it was the duty of the executors to have converted it, namely, till the end of the first year from the testator's death, and therefore that the executors ought to be allowed, in their *accounts, the extra interest received in respect of that year.

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Mr. Horne admitted that, according to the principle of *Angerstein v. Martin*,† and *Hewitt v. Morris*,‡ the tenant for life was entitled to the income of the residue, not merely from the end of the first year after the testator's death, but from the time of his death. The income, however, during the first year was to be measured in the same way as during any subsequent year, and could therefore amount only, so far as the share in the Decennial Loan was concerned, to the dividends of the 3*l.* per cent. stock, which, at the end of a year from the testator's death, might have been purchased with the proceeds of that share.

THE LORD CHANCELLOR :

During the first year after the testator's death the tenant for life is entitled, not to the interest on the Decennial Loan, but to the dividends on so much 3*l.* per cent. stock as would have been produced by the conversion of the property at the end of that year.

† 24 B. R. 32 (T. & B. 232).

‡ 24 B. R. 39 (T. & B. 241).

1827.
June.
Dec. 17, 22.

1828.
April 15.

Lord
LYNDHURST,
L.C.

1828.
House of
Lords.
Lord
LYNDHURST,
L.C.

Lord
REDESDALE.
[225]

THE KING OF SPAIN, DON FRANCISCO TACON,
AND DON MATEO DE LA SERNA *v.* DON JUSTO
DE MACHADO AND OTHERS.

(4 Russ. 225—240 and 560; S. C. 6 L. J. Ch. 61. On appeal to House of Lords, nom. *Hullett v. The King of Spain*, 2 Bligh (N. S.) 31—64; S. C. 1 Dow & Clark, 169.)

An instrument, executed by foreigners in a foreign country, must, on a demurrer, be construed according to the obvious import of its terms, unless there are allegations in the bill that, according to the law of the country in which it was executed, the true construction of it is different.

A foreign sovereign may sue in English Courts.

THE bill was filed by the King of Spain and two persons of the name of Tacon and De la Serna, described as residing in London. After setting forth certain stipulations of treaties, by which France became bound to transfer a specified amount of French rentes to such person as the King of Spain should appoint, for the purpose of being applied to the satisfaction of debts due from France to individual Spanish subjects, it stated that the French Government, in pursuance of those treaties, had inscribed a considerable amount of rentes in the name of Machado, as the agent nominated by *the King of Spain; and that, upon the breaking out of a civil war in Spain, Machado sold the rentes, and went with the money to England, where he had deposited part of it in the hands of Messrs. Hullett, Brothers, & Co. The prayer was, that an account might be taken of the money so deposited with Hullett, Brothers, & Co., and that it might be paid into Court or to Tacon and De la Serna.

To connect Tacon and De la Serna with the suit, the bill stated that the King of Spain had appointed two boards—one, the board of examination and liquidation, and the other the board of appeal—who were to adjudicate on the rights of persons claiming to be entitled, under the treaties, to a share of the monies furnished by France; and then it set forth a document, dated on the 11th of July, 1825, and alleged to be duly executed according to the formalities required by the law of Spain. By this instrument, the president and members

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of the board of examination and liquidation, after reciting a decree of his Catholic Majesty, dated on the 4th of July, 1825, by which he directed the board to give such powers and instructions as were thereafter contained, “did, by virtue thereof, and of the ample powers and authorities possessed by the said board for performing and executing all matters and things annexed to its commission, with the incidents thereof, and for recovering and securing at its disposition, as the representative of the creditors, the funds assigned to them by the said treaties, give and grant full power and authority, and without any limitation, general and special, so far as by law might be requisite and necessary, unto Don Francisco Tacon and Don Mateo de la Serna, as such commissioners as aforesaid, jointly and severally, for and in the name of the said royal board, and representing its rights and actions, and those of the president and members thereof, as the representatives *of the general body of creditors whereof the liquidation is confided to them, &c., to ask, demand, recover, and receive all and every such funds belonging to the claimants as should or might be in the kingdom of England, in the hands, custody, or possession of the Government thereof, corporations, establishments, public or private companies, or other persons, &c., but more especially those then being, or which ought to be, in the hands, custody, or possession of Don Justo José de Machado, belonging to the said creditors by virtue of the treaties—each of them the said Tacon and De la Serna proceeding, in respect of the said claims, conformably to such instructions as should be communicated to them by the said royal board; and, on recovery of the funds under and by virtue of such claims, to deposit the same in the Bank of England, to be at the disposal of the board as the representative of the said creditors, and in order to the payment of their claims; and for all sums by them so recovered and received, to give and grant all necessary receipts, releases, &c.: and they did thereby further authorise and empower the said attornies and commissioners, if need or occasion should be, to resort to and have recourse to judicial measures according to the laws of this country, by appearing either personally

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or through the medium of one or more attorney or attornies, whom they were at liberty to nominate, substitute, and support, as often as occasion should require, before all competent judges and tribunals, both supreme and subordinate, so that, in respect of the premises, and every matter and thing thereunto belonging, the said commissioners, Don Francisco Tacon and Don Mateo de la Serna, were thereby invested with full power and authorities, and the most ample, absolute, and unqualified administration and exoneration; and also with full power and authority to swear, appeal, petition, and do and perform all other necessary acts, matters, and things."

[228] To this bill the defendants, who were within the jurisdiction, filed a general demurrer for want of equity.

1827.
June.

Mr. Heald, Mr. Pepys, and Mr. J. Russell, for the demurrer.

Sir Charles Wetherell, Mr. Shadwell, and Mr. Wheatley, for the bill.

In support of the demurrer it was alleged, that none of the plaintiffs had such an interest as entitled them to sue in a court of equity for the monies in question; that the King of Spain, being a foreign absolute sovereign, was not capable of maintaining a suit in a court of equity here, or at least he was not capable of maintaining a suit for the enforcement of alleged rights, belonging to him only in his royal character; that the bill was objectionable for defect of parties; that, even if the King of Spain had such an interest in the funds mentioned in the bill as would have entitled him to sue, yet Tacon and De la Serna had no interest in them, and that a bill, in which persons, who had no interest in the suit, were conjoined as plaintiffs with a person who had an interest in it, could not be sustained.

Dec.

The LORD CHANCELLOR desired that the demurrer might be argued again, by one counsel on each side, merely as to the objection arising from the alleged improper conjunction of plaintiff.

Dec. 17.

Sir Charles Wetherell, in support of the bill:

It cannot be assumed on this bill, that Tacon and De la

Serna have no interest in the fund. It is clear that, under the instrument of the 11th of July, 1825, they are the persons entitled to receive the money, and to give discharges for it; so that, even according to our notions, they have an interest in the recovery of the money, and a duty to perform, which is connected with the enforcement of the rights asserted by this bill. Part of the prayer is, that large sums may be paid to them. Moreover, that instrument, being executed in Spain by Spanish parties, must be construed according to the laws of Spain; and it would be a bold construction to assume, that, according to the laws of Spain, Tacon and De la Serna are mere attornies. * * *

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Here the claim of Tacon and De la Serna is not adverse to, but in furtherance of, the claim of the King of Spain; and his Catholic Majesty's title to relief remains unimpaired, whether they are held to have title or not.

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* * * * *

Mr. J. Russell, contra :

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Sir Charles Wetherell, in reply.

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THE LORD CHANCELLOR [after stating the facts] said :

Dec. 22.

One point, which was argued on that demurrer, and which was spoken to a second time, was, that Tacon and De la Serna have no interest in this property, so as to entitle them to sue for it in this Court; and if they have no interest in this property, that then the circumstance of their being joined as plaintiffs on the record with the King of Spain, (assuming that the King of Spain has such an interest as would entitle him alone to sustain a suit), is a good ground of demurrer.

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The first question, therefore, is, whether Tacon and De la Serna have any interest in the subject-matter of this suit. The two boards—the board of examination and liquidation, and the board of appeal—were constituted for the purpose of ascertaining who were the individual subjects of Spain that had claims on the fund; they were tribunals constituted for the purpose of adjudication. After the fund had been collected and deposited,

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they were to issue certificates of their adjudications; and the persons, holding those certificates, were to be entitled, on application to the King of Spain, or to the persons appointed by him, to receive a proportion *of the fund corresponding with those certificates. In consequence of the difficulties which were thrown in the way of obtaining the money from Machado, the King of Spain authorized these two tribunals to appoint commissioners, for the purpose of endeavouring to get it into their hands: and these commissioners were appointed by an instrument which is set out on this record. On looking at that instrument, it appears, on the construction of it, to be a mere power of attorney: it is, in its form, very similar to an English power of attorney; it gives Tacon and De la Serna power to sue, to demand, to receive, and give acquittances, and, upon receipt or recovery of the money, to deposit it in the Bank of England, or to secure it in any other mode. Construing his instrument according to the obvious import of its terms, as it is set out in the bill, I do not think that it conveys any interest whatever to Tacon and De la Serna; it is merely an authority to them to act as attorneys for the persons whom they represent.

It was suggested, in the course of the argument, that it was difficult for us to be quite sure as to the construction of this instrument; for it was an instrument executed in Spain, and was therefore to be construed according to the laws of Spain. The answer is obvious. The instrument is set out on the record, and we must construe that instrument according to the natural import of its terms. If it is to have a peculiar sense and construction, arising out of the laws of Spain, it was incumbent on those who contend that such a construction should be given to it, to have made a statement to that effect on the face of the bill. There being no such allegation, I must construe the instrument according to its obvious import; and, after having perused it repeatedly with as much attention and care as I could give to it, I think that it is a mere power of attorney, authorizing *Tacon and De la Serna to collect the money, and to sue for it in the name of their principal.

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[The demurrer was allowed.]

After the allowance of the demurrer, the King of Spain alone filed another bill against the same defendants, and for the same purposes as before. The defendants demurred again; the demurrer was overruled by the LORD CHANCELLOR; and the defendants appealed to the House of Lords.

HULLETT
THE KING OF
SPAIN.
1828.
April 15.

[4 Russ. 560]

Mr. Pepys and Mr. Russell for the appellants.

[2 Bligh
(N. S.) 45]

The Attorney-General and Mr. Horne for the respondents.

For the appellant :

It has never been held that a foreign sovereign can sue in courts of equity in England; and according to the principles of such courts, such a plaintiff ought not to be allowed to sue therein, inasmuch as by no possibility can process be issued with effect, or equity done, or a decree enforced against him. The pretended rights, on which the plaintiff in this bill relies, are rights which he claims merely by virtue of his prerogative as King of Spain; and it is not according to the law or constitution of England, that an English court of equity should be made instrumental in enforcing in England the prerogative of a foreign sovereign. * * *

In the course of the argument the LORD CHANCELLOR made the following observations :

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* * That a King is entitled to sue as a King cannot be disputed. As a suitor he submits himself to the jurisdiction of the Court, otherwise it might be an objection that you could not control him. But if he comes here as a suitor, he submits himself to the jurisdiction. Has not the sovereign power of another country the common privilege of mankind? Do you say that by the law of nations he is deprived of that privilege [by] being the King of Spain?

[47]

* * * * *

LORD REDESDALE :

This is one of the clearest cases that can possibly be stated. I conceive that there can be no doubt that a sovereign may sue. If he cannot, there is a right without a remedy; for it is only by

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suit in Court, that the respondent can obtain this money : he sues as every sovereign must sue, generally speaking, either on his own behalf, or on behalf of his subjects. If the courts of justice were to refuse to receive his suit, I apprehend that it might be a just cause of war. All transactions on behalf of nations must be transactions with the sovereign power of those nations : it cannot be transacted otherwise, and what is the subject of the present suit ? If any person had a right to object to the authority of Machado in receiving this money, it was the Government *of France. The French Government did not object to it : they paid the money to Machado, and he is put in possession of the fund. Machado receives it as the agent of the King of Spain : it was in that character alone that he received it. The only persons who had a right to dispute the authority of Machado to receive it, was† the Government of France, and the Government of France did not dispute it. Machado, having received the money, deposits it in the hands of Messrs. Hullett and Brothers ; and the single pretence, on which there can be the slightest objection in this case, is, that he deposited it in the name of Achilles de Pereira. This man, it is stated, was a person whose name was made use of by Machado, for a particular purpose, and it is so admitted by the appellants in this case. It is stated that the defendants have rendered all the accounts to Machado, and never pretended that this man had any interest in the fund in their subsequent transactions with Machado. The bill states, therefore, that this is a mere pretence on their part, and that in truth they have acknowledged Machado to be the person to whom they are to be accountable. Who is Machado on the statement of these proceedings, but the agent of the King of Spain, in his sovereign capacity ? It is in his sovereign capacity that he appoints Machado as his agent, and Machado is responsible to the King of Spain. Having received the money in this character, what have the appellants to do with all these treaties ? Nothing : as I apprehend. They have this money in their hands, as the depositaries of Machado, the agent of the King of Spain ; that is the truth of the case, as appears on the record.

Under these circumstances, therefore, the appellants ought to

† Sic.

answer this bill, and to say what is the *money they have in their hands, and to pay that money as the Court shall think fit to direct. If there existed such claimants as are stated, and who might perhaps, some of them, be sufferers if the money was disposed of, without the control of the Court, the bill only prays that the money should be paid into Court; and if there are any persons who have claims, the money being there, they may exhibit any suit they think fit for that purpose: but that is no reason whatever why the defendants should not answer this bill, admitting what money is in their hands, and paying that money into Court. I conceive, therefore, that this demurrer ought not to be allowed. Such has been the decision of the Court below, and I am disposed to move your Lordships to affirm that decision; for I cannot find any ground whatever, on which it can be resisted.

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As to the proposition that a sovereign Prince cannot sue, it would be against all ideas of justice. In what manner is this money to be got out of the hands of the defendants, if a sovereign power cannot sue for it? He is bound with a trust for his own subjects when he has obtained the money; but with the execution of that trust you have no more to do, than you would have in many proceedings in this country: as where Commissioners are appointed, for the purpose of adjusting claims between different Governments, with respect to which you would not interfere in courts of justice; because the sovereign power of the country must have a power to appoint proper boards for that purpose. It is stated, that such a board is appointed, and that board is in Spain, and not amenable to the jurisdiction of this Court. I cannot, therefore, find any ground on which these parties can refuse to answer this bill; certainly, in honesty, they cannot refuse; they do not pretend, they cannot *pretend, that the money is their own. By answering the bill, and submitting to pay the money into Court, they would be free from all further responsibility, and then it would remain to be disposed of, as might be just.

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If there were such persons as is suggested having claims on this sum of money, and they had a right to institute a suit on the subject, it would be their business to institute that suit; but

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at the same time I should doubt extremely whether the Court of Chancery could entertain such a suit under the circumstances, any further than to order the transfer of these funds to the boards which the bill states are constituted by the King of Spain for the purpose of liquidating the claims of his subjects with respect to that fund. What has been done in this country, where boards of a similar description have been instituted? The sovereign power of every state must be entrusted with such an authority, and there cannot be any transaction between nation and nation carried on if this demurrer should be allowed. It is a transaction of such a description, that the right necessarily accrues to the sovereign power in Spain. That the Spanish sovereign is a trustee for his own subjects, may be true; but the Court of Chancery cannot enforce properly that trust. The hand entitled to receive the fund, according to what may be deemed the law of nations, is the King of Spain, or the person whom he appoints for that purpose. Accordingly, the French Government allowed Machado, as the agent of the King of Spain, to receive the money; and the French Government were the only persons who had any right to dispute the authority of Machado to receive it. Machado did receive it, under the authority of the King of Spain, and the money is now in the hands of these persons, under the authority of Machado. On these grounds I submit that this demurrer ought to be overruled.

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An objection was made that Pereira was not a party. There is a statement in the bill sufficient to shew that he has no interest in this money, and the circumstances which are stated, must be considered as admitted by the appellants in their demurrer. They admit, therefore, that so far from this man having any interest in the fund, the defendants have constantly rendered their accounts, not to him, but to Machado; that is the statement in this bill, therefore they have themselves, by admitting that statement in the bill, admitted that this man has no interest. On these grounds it appears to me, that the decision of the Court below is right, and therefore I move that the judgment pronounced by the Court below be affirmed. I do not wish you to consider my opinion as of considerable force on

this subject, but it certainly is a subject, on which, in the early part of my professional life, I bestowed a good deal of pains and attention.

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THE LORD CHANCELLOR :

I see no reason to alter my opinion, the grounds of which I have stated in the course of the argument.

Judgment affirmed, without costs.†

NEROT v. BURNAND.

(4 Russ. 247—262; S. C. 6 L. J. Ch. 81; affirmed, 2 Bligh (N. S.) 215.)

Where a partnership is dissolved, and, after the dissolution, one of the partners, without the consent of the other, continues in possession of the partnership effects, and carries on the same business on the same premises, in the course of which the specific effects that belonged to the partnership are, in whole or in part, consumed, and replaced by others; the effects which are found on the premises, and with which the business is carried on at the date of a decree declaring the partnership to have been dissolved before the institution of the suit, are not to be treated as property of the partnership.

What is evidence of the existence of a partnership.

JOHN NEROT, while carrying on business as an hotel-keeper, in a messuage situate in King Street, known by the name of "Nerot's Hotel," made his will, dated on the 30th of January, 1798, whereby, after declaring it to be his intention to assign unto John Dax, the messuage and hotel for the remainder of his term therein, together with all his effects in or about the same, and the business carried on in it, in trust for the benefit of his son and daughter, James Nerot and Mary Nerot, subject to their paying unto him an annuity to be agreed upon between them for his life, he, the testator, bequeathed unto his son, his daughter, and John Dax, 10*l.* each; and, as to all the residue and remainder of his personal estate and effects, except the hotel, and the plate, furniture, and effects in and about it, he gave the same unto his daughter and son in equal shares; and he *appointed

1827.
July 20, 21.
Dec. 22.

Lord
LYNDHURST,
L.C.

1828.

House of
Lords.

Lord
LYNDHURST,
L.C.

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† The reason given was the dignity of the plaintiff.

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BURNAND. his daughter Mary Nerot, and John Dax, his executrix and executor.

The testator died in May, 1804, without having executed any such assignment as was referred to in his will, and leaving his son and daughter his only next of kin.

The daughter alone proved the will. After the death of her father, Miss Nerot continued to carry on the business in her own name, on the same premises, and in the same manner, as it had been conducted previously. In the beginning of 1810, the lease of the premises in King Street being about to expire, she transferred the business to a house in Clifford Street, which was purchased by her in her own name, and conveyed to her in fee; and there the concern was managed, in the same manner as before, until the 16th of September, 1819, when she intermarried with the defendant George Burnand. By a settlement made in contemplation of the marriage, and dated the 21st of August, 1819, the hotel and the effects in and about it were conveyed and assigned to Flexney, on trust to sell the same, and to stand possessed of the proceeds, when invested in the public funds, upon certain trusts for the benefit of the husband and wife, and the issue of the marriage.

[*249] On the 12th of January, 1820, James Nerot, who, from the year 1808, had been almost constantly resident on the Continent, filed his bill against Mr. and Mrs. Burnand, alleging that the business had been carried on by his sister for the equal benefit of himself and her, and with the effects of the testator; that the house in Clifford Street had been purchased without the concurrence of the plaintiff, but had been paid for with money arising from the assets of the testator or from the profits of the business; that the business carried *on in Clifford Street was a continuation of the business before carried on in King Street; that Mary Nerot had from time to time advised with him as to the management of the concern; that she had received monies from him for the purpose of being employed in it, and made payments to him on account of the profits; and that the co-partnership, which had thus subsisted, ceased upon her marriage. The prayer was, that the settlement of the 21st of August, 1819, might be declared void as against the plaintiff; that the partnership

might be declared to have ceased on the marriage, or might be decreed to be now dissolved; that the premises in Clifford Street, with the good-will of the trade and effects in and about the house, might be sold; that the accounts of the partnership might be taken; and that the balance, which should be found due to the plaintiff, might be decreed to be paid to him by Mr. and Mrs. Burnand, or out of their moiety of the monies to arise from the sale of the partnership property.

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The defendants, George Burnand and Mary his wife, by their answer stated, that Mary Burnand and the plaintiff, soon after their father's death, caused an inventory of his property to be made, and had several meetings to determine on the mode of disposing of it; that it was at length agreed that the household furniture, plate, and linen, with the lease of the hotel, and the good-will of the trade, should be valued, and that she, Mary Burnand, should become the purchaser of the plaintiff's moiety at such valuation; that, in June, 1804, the valuation was accordingly made, and amounted to the sum of 2,866*l.*; that she, in pursuance of the agreement, had paid to her brother, or for his use, at various times, monies to the amount of 1,183*l.*, being the moiety of such valuation; and that she had, at different times, paid to him other sums of money, and to an amount exceeding his proportion of the testator's residuary *estate; that, the defendant Mary having thus become the sole owner of the hotel, advertisements, drawn up by the plaintiff himself, were circulated with his privity, in which the hotel was described as "having now become her property," and in which she was mentioned as the only person interested in the business; that the premises in Clifford Street had been purchased with her own monies, or with monies borrowed and since repaid by her; that the trade had always been carried on for her own sole and exclusive benefit; that all the dealings and accounts of the concern were in her own name; that on no occasion had the money or the credit of the plaintiff been employed in it; that he had never attempted to interfere in it as a partner; that his advice had never been asked in respect of it, except in so far as she might have communicated with him as her brother, concerning incidental occurrences; that she had never received monies from

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him for the purpose of being employed in the business ; and that she had never made any payment to him on account of profits ; but that she had frequently advanced to him considerable sums, for which he was still her debtor.

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The principal witness on behalf of the plaintiff was Joseph Cary, partner in a house, who had been the commercial agents of the plaintiff. He stated, that the defendant Mary, in many conversations which she had with him in 1805, 1806, and 1807, declared, “ that all consideration of a valuation or agreement for the purchase of the good-will, stock in trade, and property of the hotel, was abrogated and at an end, in consequence of her inability to pay for the plaintiff’s share ; that, in 1805, 1806, and 1816, he, on behalf of the plaintiff, inspected the books of the concern, and, on these occasions, the defendant, Mary, said, that she was carrying on the business for the joint benefit of herself and the plaintiff ; that, on inspecting the books and *accounts in 1805, he found a great deal of irregularity and confusion in them, and particularly that receipts of sums to a considerable amount had been omitted to be inserted ; and that she promised to keep the accounts more regularly in future ; that, on his examining the books in 1806, he found that they were kept with more regularity ; but, as to the sums omitted to be inserted in the accounts of the preceding year, she maintained that she could not give any better explanation, but that she had not made any private purse out of the concern, and she promised to continue to keep, in future, more regular accounts than those kept in her father’s lifetime ; that he, Cary, told her, that his motive for inspecting and examining the books was, to take some account of the property, money, and effects which she was in possession of, as executrix under the will of her father, and that the plaintiff might know how the hotel trade was going on, and how the accounts of the concern were kept.”

This witness also stated, that the defendant Mary had frequently applied to him, as the agent of her brother, for advances of money to be employed in the business ; and that, in January, 1809, and February and March, 1810, he, on the plaintiff’s account, advanced to her the sums of 160*l.*, 400*l.*, and 100*l.*, for the purpose of paying part of the purchase-money of the

premises in Clifford Street, and of repairing and fitting them up; and that he and his partners had furnished wines for the hotel, with which they had debited the plaintiff.

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The evidence on the part of the defendants was intended to shew, that the plaintiff had entered into an agreement, as stated in their answer, to sell his interest in the hotel and business to his sister, or to prove circumstances from which such an agreement was to be inferred; and they relied strongly on a letter from the plaintiff to his sister, dated at Paris, the 16th of August, *1810, in which he appeared to treat the hotel and the business as if he had no interest therein.

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To explain the latter circumstance, the plaintiff proved, that, "at the time of writing the letter, he was in France, under his Majesty's licence, for the purpose of recovering and shipping British property for England; that any intimation on his part of his being connected with England, or having property there, would have been attended with personal danger; that all his property in England was conveyed to other persons, so as to have the appearance of belonging to them, and that all letters written by him, while he was abroad, were so worded, as to prevent the functionaries of the French Government from knowing that he had any concerns or property in England."

During the suit, Mr. and Mrs. Burnand remained in possession of the hotel, and continued to carry on the business in the usual manner.

On the 5th of March, 1824, the cause came on to be heard before the Vice-Chancellor; and by the decree then made, it was ordered, among other things, that the parties should proceed to a trial of the following issue: "Whether there was, in the year 1804, an agreement for sale by the plaintiff to the defendant, Mary Burnand, of his share and interest in the good-will, lease, stock in trade, and other property and effects in the pleadings mentioned."

The issue was tried in the Court of Common Pleas on the 6th of December, 1824, when the jury gave a verdict for the plaintiff, finding that there was not any such agreement.

On the 23rd of April, 1825, the cause was heard before the Vice-Chancellor upon further directions: when the *Court

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declared, "that the hotel business carried on in King Street and in Clifford Street, under the designation of 'Nerot's Hotel,' from the death of John Nerot, until the 16th day of September, 1819, was carried on by the defendant Mary in copartnership with James Nerot, in equal shares, and that such partnership was dissolved on the 16th day of September, 1819; and that the freehold messuage in Clifford Street, and all the household goods and furniture, plate, linen, china, and wines, stock in trade, implements, and other effects, being in or about the premises, formed a part of the copartnership property;" and it was ordered that the said freehold hereditaments and the household goods, furniture, plate, linen, china, stock in trade, wines, and other effects, in and about the premises, should be sold. Directions were also given for taking the accounts of the personal estate of the testator, and of the partnership dealings,

From this decree Mr. and Mrs. Burnand appealed.

The appeal was argued before Lord Eldon; but no judgment had been given when his Lordship resigned the Great Seal.

July 20, 21.

The case was again heard before Lord Lyndhurst.

Mr. Horne and Mr. Roupell, for the appellants.

Mr. Heald and Mr. Barber, for the respondent.

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The topics principally relied on by the appellants were, that, if any partnership existed between the brother and sister, it must have been constituted by an agreement entered into after the father's death; that there was no evidence of any such agreement, nor was any date assigned, to which it was to be referred; that the finding of the *jury on the issue only negatived the allegation, that the plaintiff's moiety of the hotel, and of the effects in and about it, and of the good-will of the business, had been purchased by the defendant at a fixed sum: but that, though the brother was entitled to a moiety of the effects, with which the executrix, having also the beneficial interest in the other moiety, had carried on the business, he did not thereby become a partner in the trade; that there was a total absence of

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all those circumstances, which, in the natural course of things, would have accompanied the existence of a partnership, while, on the other hand, many of the admitted facts, and, more especially, the conduct of the plaintiff himself, were not reconcilable with the hypothesis that a partnership had actually existed; that the communications and dealings of the defendant Mary with Cary did not constitute such a train of proceedings as would have taken place during a partnership of fifteen years' continuance, and could all be explained by the partial interest which the plaintiff might claim in a business, on which, and on the property involved in it, he had a demand for his share of so much of the assets of his father as had been employed in carrying it on; that, after the lapse of so many years, no reliance could be placed on the evidence of a single witness, as to expressions alleged to have been used by the defendant in 1805, 1806, and 1809; and that Cary's evidence was not corroborated by the circumstances of the case, was directly contradicted by the solemn oath of the defendant, and was discredited by the tenor of the plaintiff's own letter.

It was further insisted, that, at all events, the house in Clifford Street could not be treated as partnership property. The defendant Mary had alone contracted for it; she paid for it; the conveyance was made to her; the plaintiff had not been consulted in any part of the transaction, and could not have been compelled to adopt the purchase. *Even if a partnership had subsisted in the business previously carried on in the leasehold premises in King Street, the purchase of freehold hereditaments was not a transaction in the usual course of the dealings of such a partnership; and if freehold hereditaments, bought by, and conveyed to, one of the partners, were afterwards used for partnership purposes, the partnership became not the owner, but merely the tenant, of the premises. Besides, the issue of the marriage (if there should be any) would be purchasers for a valuable consideration, and would have a right to have the trusts of Mr. and Mrs. Burnand's marriage settlement executed in their favour.

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It was also argued, that the decree of the VICE-CHANCELLOR was inconsistent, in so far as it declared that the partnership

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ceased on the 16th of September, 1819, and yet treated all the effects, which were on the premises at the date of the decree in April, 1825, as partnership property.

Dec. 22.

THE LORD CHANCELLOR :

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In 1798, a person of the name of Nerot, who kept an hotel in King Street, St. James's, being then in the occupation of this property, made his will, by which he bequeathed the residue of his personal estate to his son James Nerot, the plaintiff, who at that time was about twenty years of age, and to his daughter Mary Burnand, then Nerot, who was living upon the premises with her father, and whom he also appointed his executrix. In his will he declared that it was his intention to assign his interest in the house in King Street, together with the effects in it, and the business, to a trustee, for the benefit of his son and daughter. No such assignment, however, was ever in point of fact made; and, in 1804, the testator died. Mary Burnand had, up to the period *of her father's death, managed and conducted this business. After his death, she continued to conduct the business as before; and, as executrix, she took possession of his assets, and, among the rest, of this property, though it was excepted in the will. There can be no doubt that Mary Burnand and Mr. Nerot, who were the only children of the testator, were entitled jointly† to this property at the time of his death. Upon this point there is no dispute.

The business was carried on by Miss Nerot, upon the premises in King Street, till the year 1809 or 1810. Mr. Nerot was frequently absent from this country, in consequence of his carrying on business of some description in France. In the year 1809, the lease of the house in King Street being upon the point of expiring, a negotiation was opened by Miss Nerot for purchasing a house in Clifford Street, with the view of transferring the business thither. During the course of that negotiation, she made an application to a person of the name of Cary, who acted in this country as the agent of Mr. Nerot, for an advance of money on Mr. Nerot's account: he demurred for a considerable time, but, at last, he offered to advance 400*l*. In the mean time

† *I.e.*, entitled as his next of kin in equal shares.—O. A. S.

money had been procured in other quarters; and, the house having been purchased by Miss Nerot, the business ultimately was transferred to the premises in Clifford Street. From 1810 till the month of September, 1819, the business was carried on by Miss Nerot, in Clifford Street.

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In September, 1819, Mr. Nerot being then absent upon the Continent, Miss Nerot married the other defendant, Mr. Burnand. As soon as Mr. Nerot obtained information of this, he was dissatisfied with the marriage, and declared the partnership between him and his sister dissolved. No delay whatever seems to have *taken place in his determination to act upon the marriage as a dissolution of the partnership; for, in Hilary Term, 1820, he filed the present bill, for the purpose of obtaining a declaration that the partnership was at an end from the period of the marriage, or a decree that it should be dissolved by the order of the Court, and for an account generally in the usual form. The defence, set up by the answer, was of this nature: That, shortly after the death of Mr. Nerot the elder, an agreement had been come to between James Nerot, the son, who deemed it inconsistent with his views in life to be concerned in this business, and his sister, that the property should be valued, and that half the value of the property should be paid to the plaintiff. The VICE-CHANCELLOR directed an issue, for the purpose of trying the fact, as to whether or not such an agreement had been entered into. That issue was tried before the Chief Justice of the Common Pleas: and, upon the trial, Mr. Nerot, Mrs. Burnand, a person of the name of Cary, and others, were examined as witnesses. The jury were of opinion that no such agreement had been entered into, and they found a verdict for Mr. Nerot on that issue. The CHIEF JUSTICE and the jury seem to have been of opinion, that a partnership existed between these parties. Lord ELDON has observed, and justly observed, that the CHIEF JUSTICE and the jury had nothing to do with the question of partnership; and whatever impression may have been made on their mind with respect to the question of partnership, as they had no right to decide that question, I must dismiss entirely from my consideration, although all the parties were examined before them, the impression made upon their minds as to that point.

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The question then stands thus: These parties were jointly interested in this property from the death of Mr. Nerot; no account has ever been come to, because *only one account has been insisted on, and the jury have decided against the existence of that supposed account. Therefore, these persons being jointly interested in the property, Miss Nerot has continued in the occupation and enjoyment of it from the year 1804 to the year 1819; and the only question is, whether these parties, being jointly interested in this property, were partners, the business having been actually conducted by Miss Nerot.

I have read the evidence several times with great attention, with a view of coming to what I could satisfy myself was the just conclusion upon this point; and, though I have entertained doubts at different periods, I think, in the result, I am bound to decide that there was a partnership. I am bound so to decide, unless I reject the testimony of Mr. Cary: for his evidence is distinct and precise to that fact. Mr. Cary was examined before the jury, and it was there admitted he was a respectable man: he was opposed to Mrs. Burnand, who was also examined on that occasion; and I see nothing to lead me to doubt the credit due to Mr. Cary. He states, that he acted in this country as the agent for Mr. Nerot, who was frequently on the Continent; that he, as his agent, from time to time inspected the books by his authority, and with the consent of Mrs. Burnand; that he over and over again pointed out to her errors in the accounts; that he desired her to keep the accounts with more regularity; that she admitted they were kept irregularly, and promised to keep them more regularly in future, saying, "I cannot correct what has already passed, but I have made no private purse;" and that she said repeatedly upon those occasions, that the business was carried on for the joint interest of herself and her brother. It appears that money was paid out of the concern for the benefit of Mr. Nerot; that he from time to time advanced monies to the concern; that, *when the question arose as to the purchase of the house in Clifford Street, application was made to him to advance money for that purpose; and she stated, upon his hesitating to do so, that it was as much for her brother's interest, as for hers, that the purchase should be completed.

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Taking these circumstances into account, and the various other circumstances detailed in the evidence of Mr. Cary, I am bound to come to the conclusion, not only that Mr. and Miss Nerot were jointly interested in the property, but that the business was carried on between them in partnership, though nominally by Miss Nerot alone.

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I must, however, state, that I have had considerable hesitation, arising out of a letter written by Mr. Nerot, while in Paris, to his sister. Looking at the terms of that letter, its obvious import is, that he had no interest whatever in the property; and, I confess, I have very great doubts as to whether the explanation attempted to be given was satisfactory. But the circumstance, which guides and governs me as to that letter, is, that it is quite clear that Mr. Nerot, according to the verdict of the jury, was in some way interested in the property. Now the letter, if it is to be taken according to its terms, goes to negative that he had any interest. The obvious construction, therefore, to be put upon the letter, would carry us too far; because it would be at variance with that which I must now take to be a fact—at variance with the finding of the jury, that he actually had an interest. This satisfies me, that I must not act upon that letter, in opposition to the evidence of Mr. Cary.

Under these circumstances, the question arises as to what decree should be pronounced. One question is, *when did the partnership commence? I think, upon the evidence, I must take the partnership to have commenced from the death of the father; and for this obvious reason, that the father intended to assign this property to a trustee for his two children, in order that the business might be carried on for their joint benefit in partnership. It is true that the intended assignment never was made; but, no alteration having taken place in the manner of carrying on the business, which had been conducted by Miss Nerot during her father's life, and was afterwards conducted by her in the same form, I consider, if she and her brother were afterwards (as by her declaration it appears they were) partners, that I must refer that partnership to the death of the father, pursuant to the arrangement which had been proposed between them.

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The next question is, when did the partnership terminate? It

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was a partnership for no definite period; and either party therefore might, at any moment, have put an end to it by notice. Miss Nerot married Mr. Burnand without consulting her brother, or, at least, without his assent. If she chose so to change her situation, as to make Mr. Nerot, in point of fact, if the partnership went on, a partner with Burnand, Mr. Nerot had a right, the moment he received notice of that step, to act upon it, and say, "Your marriage has put an end to the partnership." No delay took place in that respect; for the bill was filed as early as Hilary Term, 1820, the marriage having taken place towards the close of the preceding year. I agree therefore with the VICE-CHANCELLOR, in saying that the partnership was dissolved on the 16th of September, 1819.

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It appears to me satisfactorily made out, from all the circumstances, that the house in Clifford Street was bought with the partnership property—bought, in the *first instance, partly with the partnership property, partly with money borrowed by Miss Nerot and afterwards repaid out of the partnership effects, and partly upon the credit of the house that belonged to the partnership; and, I think, that part of the VICE-CHANCELLOR's decree, by which he directs the house to be sold, must be affirmed.

There is a part of the decree, however, in which I cannot concur. The dissolution of the partnership took place in September, 1819. The VICE-CHANCELLOR has directed all the property to be sold, which was in the house in Clifford Street at the time when the decree was pronounced, several years after the dissolution of the partnership; as if all the property, which, at the time of the decree, existed in the house, was, without inquiry, to be considered as partnership property. Lord ELDON doubted greatly whether that part of the decree could be sustained; and, in my opinion, it must be varied, by directing the Master to take an account of the particulars of the partnership property which were in the house in Clifford Street at the time of the dissolution, and of the value of the property at that time; and to inquire whether any part of that property still remains in the house.†

* * * * *

† See *Crawshay v. Collins*, 26 R. R. 83, 101 (2 Russ. 325, 349).

[*Note*.—The defendants, Mr. and Mrs. Burnand, appealed to the House of Lords; and the decree of the LORD CHANCELLOR was there affirmed by himself, as reported under the name of *Burnand v. Nerot* in 2 Bligh (N. S.) 215. No further report of the case on appeal appears necessary, as the judgment of the LORD CHANCELLOR only recapitulates the judgment above reported.]

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REITH v. SEYMOUR.†

(4 Russ. 263—266; S. C. 6 L. J. Ch. 97.)

1828.
Jan. 31.
Feb. 4.

Rolls Court.
LEACH, M.R.
[263]

A gift of personal estate to the wife for life, with a direction that, after her death, one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment.

The sale by the widow of a sum of 3 per cent. stock, which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of Long Annuities in her own name, does not amount to an exercise of her power.

THE testator, Robert Reith, by his will, gave all his personal estate to his wife for her life; and, from and after her decease, one moiety thereof was to be at her entire disposal, either by will or otherwise: the other moiety he gave to his brothers and sisters, and the children of some of them.

The testator's property consisted of a sum of 2,000*l.* three per cent. Consols, and of other articles of the value only of 180*l.* Soon after the testator's death, the widow sold out the 2,000*l.* stock, and invested the produce in the purchase of Long Annuities in her own name, which remained standing in her name at her death. The widow left a will; but it was admitted that there were no words in the will, which could be construed as an appointment of the moiety of the testator's personal estate, if an appointment were necessary.

The bill was filed by the next of kin of the testator, Robert Reith, for the purpose of having it declared, that, in the event which had happened, the moiety of the testator's estate was undisposed of at the death of his widow.

† *Marler v. Thomas* (1873) L. R. 17 Eq. 8; 43 L. J. Ch. 73.

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v.

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Mr. Crombie, for the plaintiffs :

When property is given to a person, without specifying any particular estate, and words are added which purport to give the same person a general power of disposition over it, he takes the absolute interest: but if only a limited estate be given in the first instance, as, *for example, an estate for life, and the same words of disposition follow, those words confer merely a power: *Anon.*,† *Tomlinson v. Dighton*,‡ *Bradly v. Westcott*. § * * *

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Mr. Wilbraham, contra :

The rule referred to applies only to real estate, being founded on the principle that the heir is never to be disinherited except by express words. Not only does the rule not apply to a residuary disposition of personalty, but there the principle of construction leans quite the other way; the intendment always being that a testator does not mean to die intestate as to any part of his personal estate. * * *

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If it shall be holden that she had only an estate for life, with a power of appointment, the acts, which she has done, amount to an exercise of the power in her own favour. * * *

Feb. 4.

THE MASTER OF THE ROLLS :

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In the case of *Irwin v. Farrer* (19 Ves. 86), the legatee herself filed the bill, praying that the trustees might be directed *to pay over the property to her; and the Court of Exchequer held, that the filing of the bill was equivalent to an appointment, thereby admitting that an appointment by the legatee was necessary. And in this respect the case is an authority for the plaintiffs. I cannot consider here that the conversion of the 2,000*l.* stock into Long Annuities was intended by the widow as an execution of her power to dispose of a moiety of the estate; that sum being in fact nearly the whole of the property of the testator, and the conversion being plainly made to increase her income. Nor can I adopt the distinction contended for between real and personal estate, but am of opinion, that, by reason of the express estate for life given to the widow, she did not take the absolute

† 3 Leon. 71.

§ 9 R. R. 207 (13 Ves. 445).

‡ 1 P. Wms. 149.

interest, but had only a power of appointment, which she did not exercise.

REITH
v.
SEYMOUR.

Declare, therefore, that one moiety of the testator's estate was undisposed of after the death of the widow, and belongs to the plaintiffs, as the next of kin of the testator at his death; and that the widow's estate is answerable for a moiety of the 180*l.*, and a moiety of the 2,000*l.* stock, or the money produced by the sale of it, at their option, with interest or dividends, according to their option, from the death of the widow; and, if necessary, let the accounts of the widow's estate be taken; and let the costs of the suit be taxed, and a moiety be paid by the plaintiffs, and the other moiety by the defendants, in respect that the question was caused by the testator's will, and that his estate must bear the expense of it.

LONG v. COLLIER.

(4 Russ. 267—271.)

1828.
Feb. 4.

The generality and vagueness of descriptions of copyhold property on the court rolls are so well known, that a vendor is not bound to shew how the description on the court rolls is to be applied to the present state of the property, if he prove that the property has actually been enjoyed and passed under that description for upwards of sixty years.

Rolls Court
LEACH, M.R.
[267]

In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the Master reports that a good title was not shewn till after the filing of the bill, if that finding proceeded on the ground, that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser insisting upon other and unsubstantial objections.

THE bill was filed for the specific performance of a contract for the sale by the plaintiff to the defendant, of certain copyhold property held by the plaintiff for his own life and the lives of two other persons, according to the custom of the manor of Barton-with-Buddesgate, in the county of Southampton.

Upon the hearing of the cause, the usual reference was made to the Master; and he reported in favour of the title. The defendant took an exception to the Master's report, which now came on to be argued.

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v.
COLLIER.

The description of the property in the court rolls was as follows: "One messuage and half yard land, containing ten acres, two tofts of land, one messuage, and one yard land, one cottage with a garden, two acres of arable land and pasture, one croft and one close containing twenty-one acres, and one close containing twelve acres, and the rents of the Buddle of Chilcombe." The description in the contract for sale was, "All that capital messuage, tenement, or farm-house, barns, stables, cart-houses, sheds, outbuildings, farm lands, hereditaments, and premises, situate at Moorstead, in the county of Southampton, as the same are now in the occupation of Bunney, as tenant of Walter Long, containing by admeasurement 219 acres, more or less."

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The defendant, by computing the messuage and half yard land at ten acres, the two tofts at two acres, the messuage and one yard land at twenty acres, the cottage and garden and two acres of arable land and pasture at two acres, the croft and one close at twenty-one acres, and the other close at twelve acres, attempted to make out that the description of the property on the court rolls covered only sixty-seven acres, or, at most, by some variation in the calculation, seventy-one acres, and could not be made to apply to 219 acres, which were admitted to be, as stated in the contract, in the actual occupation of Bunney, as tenant to the plaintiff.

On the part of the plaintiff, evidence was given, that the farm, now occupied by Bunney, as tenant to the plaintiff, had passed through a succession of proprietors to the plaintiff by the description which now appeared on the court rolls, and, under such description, had been held by the occupiers for the time being for upwards of sixty years past.

Mr. Hodgson and Mr. Lynch, in support of the exception :

Upon no reasonable interpretation that can be put on the words of the entries in the court rolls, can the premises, as there described, be made to correspond in quantity with the premises as described in the particulars of sale. It is certainly true, that the 219 acres have been in the possession of the same persons, who, by the surrenders and admittances, appear to have

been the proprietors of seventy-one acres, part of the 219. But the possession of the remainder of the 219 acres may have been without title, or under a title different from the title to the seventy-one acres. A good title is not shewn, unless the identity of the 219 acres with the premises described in the court roll be made out; and it is not easy to imagine, how 219 acres can be identified with seventy-one. The inference of their identity cannot be raised simply upon the circumstance, that the same persons have been in possession of them as owners; nor would the conclusion be much aided, even if it were ascertained that those owners had no title, except that which the entries in the court rolls exhibit.

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v.
COLLIER.

Mr. Sugden, Mr. Preston, and Mr. Tinney, contra.

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THE MASTER OF THE ROLLS overruled the exception, stating that the computation of quantity made by the defendant, was in a great degree fanciful; that the generality and vagueness of descriptions on court rolls were too well known to entitle such a computation to any weight; and that it was well established by the evidence in this case, that the whole property now in the occupation of Bunney, as tenant to the plaintiff, had continually passed and been enjoyed by the description contained in the court rolls.

In the correspondence on the title, which took place before the institution of the suit, the solicitor of the vendor, in answer to an objection that there was no evidence of the identity of the lands, offered to furnish affidavits of their having been passed and held by the description on the court rolls. The purchaser did not accept this offer, but raised other objections. The bill was then filed, not making mention of any question as to identity, but stating the other objections as the grounds on which the performance of the contract was resisted. The answer disputed the title generally.

On the reference of title, the Master overruled all the other objections, but required evidence of the identity of the premises. Affidavits of the identity were furnished; and he reported that

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v.
COLLIER.

a good title was first shewn on the 27th of October, 1826, which was the time when the affidavits were produced.

The vendor excepted to the report on the ground that the Master ought to have found that a good title was shewn before the filing of the bill.

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In support of the exception it was stated, and not denied, that the only point, in which the Master thought that the title, shewn prior to the filing of the bill, had been defective, was the absence of evidence as to the identity of the premises. Now, affidavits of identity had been tendered before recourse was had to litigation; and if they were not actually furnished, it was only because the vendee had not accepted them, but had relied on other objections, in which he failed. The fact of identity, therefore, could not be considered as a point in issue between the parties at the time of filing the bill.

It was further argued, that, even if the report were technically right, yet the rule, which throws upon the vendor the costs of a suit for specific performance up to the time when a good title is shewn, would not apply to a case like the present.

The defendant insisted, on the other hand, that, till the identity of the premises was established, no title was shewn, and, therefore, that the costs of the suit, or at least so much of the costs as were incurred prior to the 27th of October, 1826, ought to be paid by the plaintiff.

THE MASTER OF THE ROLLS :

The Master is right in finding that a good title was not shewn till the 27th of October, 1826. The exception, therefore, must be overruled. But the defendant might have had the affidavits at any time, if he had expressed a wish for them. The circumstance, therefore, of these affidavits not being actually furnished till after the filing of the bill, cannot have any influence on the question of costs.

Decree for specific performance, with costs.

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The MASTER OF THE ROLLS has in other cases followed a similar rule as to costs.

In *Holwood v. Bailey*,† the Master reported in favour of the title; but that a good title was not shewn, till at a time subsequent to the institution of the suit.

LONG
v.
COLLIER.
1830.
July 28, 29.

For the plaintiff, the vendor, it was stated, that the grounds, on which the Master proceeded in his finding, were, that a recovery had not been suffered, and some certificates, which were set forth in the abstracts, had not been verified, till after the filing of the bill; that the purchaser had never required that these certificates should be verified, and the solicitor of the vendor had, by letter, offered to suffer a recovery, which, however, was not suffered, because the vendee did not accept the offer, but insisted on other objections: and, on the authority of *Long v. Collier*, it was asked, that the decree might be made with costs.

The MASTER OF THE ROLLS said, that, if the facts were as represented by the plaintiff, he should make the decree with costs.

But, the statement of the facts being controverted by the defendant, a reference was directed to the Master to state on what grounds he had proceeded in finding that a good title was not shewn till the time mentioned in his report.

Mr. Tinney and *Mr. Koe*, for the plaintiff.

Mr. Bickersteth, *Mr. Pemberton*, and *Mr. Richmond*, for the defendant.

† No reference in the original report.

1828.

Feb. 5.

Rolls Court.

LEACH, M.R.

[272]

WILKINSON *v.* PARRY.

(4 Russ. 272—276.)

Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, and that a new trustee should be chosen in the place of the retiring trustee, and there is no power to appoint a sole trustee; there, if a retiring trustee assign the trust property to the continuing trustee alone, and he, in abuse of his trust, dispose of it, the retiring trustee is answerable.

In this case, upon the marriage of one of the plaintiffs with her late husband, a settlement was made of a sum of 1,000*l.*, which was to be invested in stock in the names of two trustees therein described. The dividends of the stock were to be paid to the intended wife for her separate use, with remainder to the children of the marriage equally, as they attained their respective ages of twenty-one. The settlement contained a power to the wife, during her life, and after her death, to the guardians of the children, to appoint a new trustee in the place of any trustee who should die or desire to retire from the trust; and in case any trustee should decline the trust, the settlement directed that such retiring trustee should assign the trust property to the new trustee so to be appointed in his place, and the continuing trustee.

In 1820, the defendants, Nicholson and Parry, were the actual trustees, duly appointed according to the power in the settlement; and the trust stock, which amounted to the sum of 1,358*l.* 10*s.* three per cents., stood in their names. In 1825, the defendant Nicholson became desirous of retiring from the trust; and a person of the name of Sherwin was appointed in his place. Sherwin accepted the trust by signing the deed of appointment; but before he had acted in the trust, he became desirous to retire from it; and a deed, appointing Parry to be the sole trustee, was prepared, to which the wife and Sherwin were made parties, but which was not executed by Sherwin. After the execution of this deed, the defendant Nicholson transferred *the trust stock into the name of Parry alone. The defendant Parry subsequently sold out the trust stock at the request of the wife and three of the children of the marriage, who

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had attained the age of twenty-one; and a deed was executed by these three children, the husband being then dead, for the indemnity of Parry in respect of the sale of the trust fund. There were two other children of the marriage who were still infants.

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v.
PARRY.

It was alleged that the stock was sold out in order to be invested in the purchase of an annuity for the life of the widow, that her income might be increased.

The present bill was filed by the wife and one of the children, who had signed the deed of indemnity, and the two infants, praying that Nicholson and Parry might be made responsible for the breach of trust committed by Parry's sale of the stock. Nicholson and Parry, and the other children, who were of age, were made defendants to the suit.

At the hearing, Parry made default; and the plaintiffs, as against him, were to take such decree as they could abide by.

Mr. Pepys and Mr. Knight, for the plaintiffs.

Mr. Sugden and Mr. Pemberton, for Nicholson.

* * * * *

For the defendant Nicholson it was argued, that the suit was defective for want of parties; for that Sherwin, the trustee named in the place of Nicholson, having accepted the office, and not having renounced the trust by executing the deed which appointed Parry to be the sole trustee, ought to have been made a party.

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The MASTER OF THE ROLLS overruled this objection also, referring to the answer of Nicholson, in which he admitted that Sherwin had retired from the trust, and stating that it would have been an imprudent act in Sherwin, if he had executed the deed appointing the sole trustee, and that, under the circumstances, there could be no relief against Sherwin.

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Upon the principal point, namely, the liability of Nicholson, the MASTER OF THE ROLLS gave his judgment as follows:

THE MASTER OF THE ROLLS:

This is a most unfortunate case for the defendant Nicholson,

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v.
PARRY.
[* 276]

who has acted with perfect integrity and the best intentions, but does not appear to me to have been well advised. By the terms of the trust deed, under *which he has acted, he was bound, upon declining the trust, to transfer the trust property to the continuing trustee and a new trustee to be appointed in his place: and nothing could relieve him from that obligation but the consent of all parties interested under the trust. It was not possible to obtain such consent here, because there were infants, who were not capable of consenting, and, therefore, could not be deprived of that security which they derived from having the trust property, upon Nicholson's declining the trust, confided to the care and integrity of two trustees instead of one. I am compelled, therefore, though with reluctance, to declare my opinion that Nicholson, as well as Parry, is liable, as it regards the infants, for any loss to their shares of the property which may be the consequence of the transfer of the stock by Parry.

All that I can now do is to refer it to the Master to inquire whether any, and which of the parties interested in the trust fund, in any manner, and how, consented to or approved of the transfer of the trust stock by Nicholson to Parry; and whether any, and which of the parties interested, in any manner, and how, consented to or approved of the sale of the trust stock by Parry: and let the Master also inquire how the produce of the trust stock was applied, and what has become thereof: and let the Master be at liberty to state any circumstances specially as to these several matters, at the request of any party: and reserve the consideration of further directions and costs until after the Master shall have made his report.

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GREGG v. TAYLOR.

(4 Russ. 279—282.)

1828.
Feb. 7.*Rolls Court,*
LEACH, M.R.
[279]

Persons who were found by the Master to be the next of kin of the intestate, and were named by the Court to be defendants in an issue directed to try the rights of other persons, who claimed also to be next of kin, were allowed a sum of 500*l.* out of the estate of the intestate, on giving security to account for it.

THIS cause was instituted for the administration of the estate of the late Mr. Osgood, who had named the late Mr. Cruise, the conveyancer, his residuary legatee. Mr. Cruise died very shortly before the testator; and, at the hearing of the cause, the Court declared, that the testator died intestate as to his residuary personal estate, and referred it to the Master to inquire, who, at his death, were his next of kin.

The Master reported in favour of two claimants on the paternal side, one of whom was one of the executors; and he disallowed the claims of seventeen other persons, who claimed, to be next of kin, on the maternal side, in equal degree with the allowed claimants on the paternal side.

The disallowed claimants, one of whom was also an executor, took two exceptions to the Master's report; one, in respect of the disallowance of their own claims; and the other, in respect of the allowance of the claims on the paternal side.

There was much evidence with respect to both claims, and the Court expressed an intention to direct them to be tried by two issues: but, the parties residing in different parts of the kingdom, so that the issues could not be conveniently tried at the same time, the Court, for the present, directed one issue only for the trial of the disallowed claims, in which the disallowed claimants were to be plaintiffs and the allowed claimants defendants; reserving the direction of the second issue, until after the trial of the first issue.

The allowed claimants, as well as the disallowed claimants, now presented petitions, alleging their poverty, and praying each to have a sum of 500*l.* advanced to them out of the estate of the testator, to defray the expenses of the trial of the issue.

The matter was several times spoken to.

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v.
TAYLOR

Mr. Sugden, Mr. Lovat, and Mr. Cooper, appeared for various parties.

Ultimately the MASTER OF THE ROLLS gave his judgment to the following effect :

Certain persons claimed before the Master, as next of kin of the testator, and their claim has been disallowed. They are dissatisfied with the Master's judgment, and are willing to try their rights at law. Their claim not being in its nature a legal demand, they can try their right at law only by the assistance of this Court, through the medium of an issue ; and this Court has granted them an issue accordingly, in which issue they must of necessity be plaintiffs.

If their demand had been legal, the executors of the testator would have been the defendants in the issue ; and in case of the success of the claimants, the costs of the defendants would have fallen upon the testator's estate, having been duly incurred by the executors in the course of administration. Strictly speaking, the executors should be the defendants here also ; and, in like manner, their costs, in case of the success of the claimants, would then fall upon the estate. But the Master, who has disallowed the claims of the plaintiffs in the issue, has allowed the claims of certain other persons to be next of kin to the testator ; and this Court has, therefore, substituted those *persons, as defendants in the issue, in the place of the executors ; first, for a general reason, which applies to all cases, because the executors, as such, have no interest in the event of the trial ; secondly, because, in this particular case, one executor is of the number of the disallowed claimants, and another executor is of the number of the allowed claimants.

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Application is now made to the Court, as well by the allowed claimants as by the disallowed claimants, for an advance of money out of the estate of the testator, to enable them to defray the expense of the trial of the issue.

The Court cannot make any advance to the disallowed claimants. Every plaintiff proceeds at law at the hazard of paying the costs, if he fails ; and there is no reason here why the rule of law should be departed from.

The case is different with the allowed claimants. They are substituted as defendants in the place of the executors; and, as the executors would have been entitled to an advance of money from the estate, it seems reasonable that those, who are substituted in their place by the Court, shall have the same advantage; and more especially, because the right of the allowed claimants is questioned, and it is to be the subject of a future issue to be directed by the Court; so that it may happen that these substituted defendants may ultimately be found not to be themselves next of kin, and consequently to have no interest in the question now to be tried. It would be unjust to expose them, not merely to the expense of a trial to assist their own claims, but also to the expense of a trial in which they take upon themselves the duty of the executors to resist the claims of others. For these reasons, the Court *directs an advance of 500*l.* to be made to the allowed claimants, who are the substituted defendants in the issue.

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v.
TAYLOR.

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If the plaintiffs in the issue should fail, the Court may direct the costs of the issue to be paid by them. If the plaintiffs in the issue should succeed, the Court may direct the costs of the issue to come out of the estate. But no event of this trial will establish the title of the substituted defendants as next of kin of the testator; and, in either case, therefore, the substituted defendants will have to account in respect of this advance of 500*l.* Under these circumstances, the Court cannot part with this sum of 500*l.*, without security, to be approved by the Master, that they will duly account for the 500*l.* as the Court shall direct. The fact that one of the allowed claimants is an executor cannot affect this principle.

The plaintiffs in the issue claim only in equal degree with the allowed claimants; and if they should succeed, the Court will hereafter direct another issue to try the right of the allowed claimants; and the now plaintiffs will then be the substituted defendants, and will be entitled to have an advance of an equal sum of 500*l.*, undertaking to account for it as the Court shall direct; but, in respect of their adjudged interest in the estate, security will not then be required of them.

If the plaintiffs in the issue now directed should fail, the Court will then have to consider who are to be the defendants in the

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v.
TAYLOR.

issue, which is to try the title of the allowed claimants; and what advance of money, if any, shall be made, and to whom, and under what terms.

1828.

Feb. 11, 14.

Rolls Court.
LEACH, M.R.
[283]

PARR v. SWINDELS.†

(4 Russ. 283—285; S. C. 6 L. J. Ch. 99.)

A gift of real estate to A. for life, with remainder to her children, as tenants in common, and, in case A. shall die without leaving lawful issue, then with remainder over, is a gift to A. for life, with remainder to her children for life, with remainder to A. in tail.

IN this case John Bullock, the testator, inter alia, after giving to his wife, for her life, five freehold messuages in Chancery Lane, devised as follows: "And from and after the decease of my said wife, in case my daughter Mary Parr shall survive her, I give and devise unto my said daughter Mary Parr, all the said five messuages, to hold the same unto my said daughter and her assigns during her life; and, after the death of my said daughter, I give and devise the same unto and equally between and among the children of my said daughter, to take as tenants in common, and not as joint tenants; and, in case she shall die without leaving any lawful issue, then I give and devise the same premises unto and equally amongst the children of my daughters Charlotte Swindels and Hannah Foster."

The testator made no other devise of these five messuages; nor was there in the will any general residuary devise.

The question in the cause was, what estate Mary Parr took under this devise.

Mr. Rose and *Mr. Lowndes* argued, that the words "in case she shall die without leaving any lawful [issue]" gave Mary Parr an estate tail by implication; and they referred to the rule as stated by *Fearne*, and the cases there cited. The rule, they said, was, that, if there be a devise to A. for life, followed by words, which, upon failure of A.'s issue and not otherwise,

† See now the effect of s. 99 of the Wills Act upon a gift thus worded, and see *Bowen v. Lewis* (1884) 9 App. Cas. 890, 54 L. J. Q. B. 55.—O. A. S.

give the *estate over to other persons, A. takes an estate tail by implication.

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v.
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Mr. Bickersteth and Mr. Wilbraham, contra :

The present case is different from those in which an estate tail has been raised by implication to effectuate the general intention of the testator. The gift to Mary Parr is followed by a gift to her children ; when the testator speaks of her dying without leaving issue, he means such issue as he had spoken of previously, namely, children. The words, therefore, can be satisfied without implication. The testator probably considered (though erroneously) that he had given the fee to the children of Mary Parr, if she left any children ; and the gift over was intended to provide for the event of her dying, leaving no children behind her.

Mr. Temple also contended that Mary Parr took only a life estate ; and cited *Hockley v. Mawbey*.†

THE MASTER OF THE ROLLS :

Feb. 14.

The plain intention of the testator was, that this property should not go over, until a failure of the issue of Mary Parr ; and to effectuate this intention, an estate tail in her must be implied. It is to be considered, whether that estate is to be immediate in her, or in remainder after estates for life to her children. If the intention, that the property should not go over to the children of Charlotte and Hannah, until there was a failure of issue of Mary, could not be effectuated without giving an immediate estate tail to Mary, there is in the books sufficient authority to warrant that construction. But as that purpose will, in this case, be equally accomplished *by an estate tail in remainder to Mary, after the life estates given to the children, I am of opinion that the better construction is, that Mary takes an interest for life, with remainder to her children as tenants in common for life, remainder to Mary in tail. This construction will give effect to all the words of the will.

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† 1 R. B. 93 (1 Ves. Jr. 143).

1828.

Feb. 16.

Rolls Court.

LEACH, M.R.

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KILLOCK *v.* GREG.(4 Russ. 285—291 ; S. C. nom. *Maxwell v. Greg*, 6 L. J. Ch. 128.)

Where notice is given by a party to his agent in a particular adventure, that another person is jointly interested with him in the adventure, this *prima facie* imposes upon the agent the necessity of accounting with such other person for his share of the adventure.

But this obligation ceases to exist, if the transactions shew that it was the intention of such other person, and of the party originally interested in the adventure, that the agents should account solely with the latter.

Mr. GILLIES, of Belfast, entered into a mercantile speculation to Russia, jointly with two other commercial houses at Belfast: his share of the adventure being one third of the whole.

Messrs. Greg and Lindsay, of London, were appointed the agents of the joint concern, through whose hands all monies were to pass; and they gave the concern a credit to the extent of 34,000*l.*

Mr. Gillies afterwards agreed that Messrs. Killock and Maxwell, who were the partners in a commercial house at Cork, should have one half of his share of the adventure; and they, in consequence thereof, were to become guarantees to Messrs. Greg and Lindsay for Gillies' one third proportion of the credit given by these gentlemen to the concern. Accordingly, Messrs. Killock and Maxwell, on the 30th September, 1809, wrote the following letter to Messrs. Greg and Lindsay: "Our mutual friend, Mr. John Gillies, informs us, that you have confirmed credits to the extent of 34,000*l.* for the *joint account of himself, Greg and Blacher, and Robert Davies, to be drawn for from Russia. We beg, in consequence, to offer guarantee for his one third proportion of the said sum."

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On the 6th of October, 1809, Messrs. Greg and Lindsay wrote a letter to Mr. Gillies, in the words following: "We have received from Killock and Maxwell, of Cork, a guarantee for your proportion of the credit we have given to Mr. Morgan, at Archangel, viz., 10,000*l.*, which he took with him, and 20,000*l.* further, which we are now forwarding in duplicate."

On the 9th of October, 1809, Mr. Gillies wrote a letter to Messrs. Greg and Lindsay, in the following words: "Messrs. Killock and Maxwell, of Cork, holding a joint interest with me

in our Russian adventures, I thought their good name would not be unacceptable to you, and they advise having done the needful."

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v.
GREG.

On the 19th of May, 1810, Messrs. Killock and Maxwell wrote to Messrs. Greg and Lindsay as follows: "We beg leave to remit you herein 1,500*l.*, Maxwell on Anderson and Swan & Co., three months, on account of our common friend, Mr. John Gillies of Belfast, which you will place to his credit accordingly."

On the 30th of May, 1810, Mr. Gillies wrote a letter to Messrs. Greg and Lindsay, which, besides matters not relating to the joint concerns, contained the following passage: "The present serves to hand four bills, amount 2,500*l.*; shall shortly remit further; and hope Messrs. Killock and Maxwell have sent their part of Morgan's draft. Messrs. Killock and Maxwell advise having further sent you 1,500*l.*; they have also sent me funds, 4,000*l.*, on which account I remit, enclosed, my *draft on Thornley & Co., 3,000*l.*, and Gordon & Co. will send you a bill for 1,000*l.* The other insurances, say one sixth, Killock and Maxwell, and the other one sixth upon joint account with Greg and Blacher, and Robert Davies, I wish you now to cover."

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Much other correspondence passed between Gillies and Greg and Lindsay, which did not bear on the grounds of decision in the cause.

Messrs. Greg and Lindsay never opened any account with Messrs. Killock and Maxwell, but carried all monies received and paid, as to one third of the adventure, to the general account of Mr. Gillies, with whom they had many other transactions: and, Mr. Gillies afterwards becoming a bankrupt, they proved, under his commission, for a balance which was due to them upon that general account.

The present bill was filed by Messrs. Killock and Maxwell, as the owners of one sixth share of the concern, for the purpose of compelling Messrs. Greg and Lindsay to account with them in respect of all monies received and paid on the Russian adventure.

Mr. Agar and Mr. Pemberton, for the plaintiffs:

The plaintiffs, by their contract with Gillies, became interested in the adventure to the extent of one sixth; and this acquisition

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of interest by them was immediately notified to Greg & Co., who had the advantage of their guarantee for the repayment of such monies as might be advanced on account of that one third share, which had belonged originally to Gillies. The knowledge, which the agents had of this state of things, imposed on them the obligation of keeping distinct accounts with *the plaintiffs and with Gillies. Either one sixth of the monies received on account of the adventure ought to have been carried to the credit of the plaintiffs, or the whole produce of the one third share ought to have been carried to the joint account of the plaintiffs and Gillies. Instead of taking this course, Greg & Co. have carried the whole produce of that one third share, of which they knew that one half belonged to Killock and Maxwell, to the general account of Gillies—in other words, they have chosen to give credit to Gillies for monies which the plaintiffs alone had a right to demand or receive.

Mr. Bickersteth and Mr. Wigram, contra :

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One of several partners cannot, by a contract with a stranger, give that stranger a right to a general account of the partnership dealings: *Bray v. Fromont*.† The agreement between Gillies and the plaintiffs constituted the latter, not partners in the adventure, but only sub-partners: and their right to an account was against Gillies, and not against Greg & Co. Even if the transactions were originally of such a nature that they might have given the plaintiffs a right to an account against Greg & Co., the subsequent conduct of the parties shows that the intention was, that Greg & Co. should account with Gillies only, and that Gillies and the plaintiffs should arrange with each other their respective rights and liabilities. The plaintiffs make their remittances through Gillies, and in the name of Gillies, to be placed to the credit of Gillies; and even when they transmit money directly to Greg & Co., they give express orders for placing it to the credit of Gillies. Monies thus remitted ought to have been placed to the credit of the plaintiffs, if Greg & Co. *had been to account with them for the one sixth of the adventure; but, as the sums, which the plaintiffs advanced on account of their

† 22 R. R. 224 (6 Madd. 5).

interest in the concern were to be placed to the credit of Gillies, it followed of course, that the produce of the adventure, attributable to that interest, was to be carried to the same account.

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Mr. Agar, in reply :

The question here is not between partners, and does not relate to the rights which a partner may give a third person against his co-partners : it is merely a question between principal and agent ; * * in whatever form the agents might keep the account, they knew that one sixth of the sums received in respect of the adventure belonged to Killock and Maxwell ; and nothing short of the most plain and express directions from those gentlemen could have authorized them to transfer Killock and Maxwell's share of the receipts from the accounts of the disbursements and receipts, in respect of the Russian adventure, to the general account between the agents and Gillies. They have in fact paid, with the money which they owed to Killock and Maxwell, a debt which Gillies owed to them.

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When Messrs. Greg and Lindsay received advice from Mr. Gillies that Messrs. Killock and Maxwell were interested in a moiety of his third share of the Russian adventure, it certainly imposed upon them the duty of accounting with Messrs. Killock and Maxwell in respect of their proportion ; and if the case rested there, the plaintiffs would be plainly entitled to the relief prayed by the bill. But the subsequent transactions amount to notice to Messrs. Greg and Lindsay, that it was the intention of Messrs. Killock and Maxwell, as well as of Mr. Gillies, that Messrs. Greg and Lindsay should account solely with Mr. Gillies in respect of the one third share, as if he had continued to be solely interested in it, and that Messrs. Killock and Maxwell were content to rest upon the personal responsibility of Mr. Gillies. The first payment by Messrs. Killock and Maxwell, on account of the joint concern, was a remittance of a sum of 1,500*l.* made to Messrs. Greg and Maxwell directly, on the 19th of May, 1810 ; and the letter of that date, in which it was enclosed, desires

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Messrs. Greg and Lindsay to carry it to the account of Mr. Gillies, and to place it to his credit. The letter from Mr. Gillies to Messrs. Greg and Lindsay, in the following month of May, refers to this sum of 1,500*l.* as remitted by Messrs. Killock and Maxwell on account of the Russian adventure, and states that Messrs. Killock and Maxwell had also sent to him, Gillies, a sum of 4,000*l.*, which is evidently on account of their interest in the same adventure; and this 4,000*l.* Gillies remits to Greg and Lindsay, and would, of course, be credited by them with such remittance.

[291] If it had been the intention of the parties, that Messrs. Greg and Lindsay should account directly with Messrs. Killock and Maxwell in respect of their moiety of *Gillies's share, the instructions as to the 1,500*l.* must necessarily have been, that it should be carried to the credit of Messrs. Killock and Maxwell; and the 4,000*l.* which was the remainder of the advance made by Killock and Maxwell on the adventure, would not have been sent by them to Mr. Gillies to be credited in account between Gillies, on the one hand, and Killock and Maxwell, on the other, but would have been sent directly by Killock and Maxwell to Messrs. Greg and Lindsay, to be credited by them to the account of Killock and Maxwell.

There is no evidence on the part of the plaintiffs to repel the inference necessarily arising from the two letters referred to. The plaintiff's bill must therefore be dismissed with costs.

GRANT v. LYNAM.†

(4 Russ. 292—297; S. C. 6 L. J. Ch. 129.)

Where a donor recommends or directs, that the donee, at her death, shall give his personal property to such of his family or such of his relations as she shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin.

But if the donee does not exercise the power, the word "relations," or the word "family," will be construed "next of kin," unless the special expressions of the donee have a different import.

THE testator, John Veal, made his will, *inter alia*, in the following words: "I give and bequeath my present dwelling-house, garden, premises, and land adjoining, now in the occupation of Mr. Charles Baker, to Elizabeth, my dearly beloved wife, for her use and benefit during her life, and with a power of giving and disposing of the said house and premises after her decease, with the limitation and condition of her bequeathing the same to any one of my own family she may think proper. Item, I give and bequeath to my said wife all my household furniture, plate, linen, books, and other utensils; and, after her decease, to any one or more of my own family she may wish or direct."

Elizabeth Veal, the testator's wife, survived him, and by her will "gave and bequeathed all her leasehold property, her monies and securities for money, goods, furniture, chattels, personal estate and effects whatsoever, subject to the payment of her just debts, funeral and testamentary expenses and legacies, to trustees upon trust to convert the same into money, and to stand possessed of the same, for the only use and benefit of John Grant, when he should attain twenty-one; and if he should die before twenty-one, then to the only use and benefit of the brothers and sisters of the said John Grant who should be living at the time of his decease, with benefit of survivorship between them."

It was proved in the cause, that the testatrix, at the making of her will and her death, had no other leasehold property than the dwelling-house bequeathed to *her by her husband. John Grant, the legatee, was nearly related to the testator John Veal, but was one degree more remote than his next of kin.

1828.
Feb. 16.
March 13.

Rolls Court.
LEACH, M.R.
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† See 37 & 38 Vict. c. 37; *In re Deakin*, '94, 3 Ch. 565, 576; 63 L. J. Ch. 779.

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It was not contended that John Grant could claim any part of the personal chattels of the testator John Veal, which might be in the possession of his widow at her death, under the general description of "her monies, &c.;" but it was insisted, that, inasmuch as the testatrix had no other leasehold estate than the dwelling-house specifically described in the testator's will, the bequest of all her leasehold property amounted to evidence of her intention to exercise her power in that respect; and further, that John Grant, being one of the testator's family, was capable of taking, although not one of his next of kin.

[On the first point *Mr. Treslove* and *Mr. Hayter* cited *Standen v. Standen*,† *Bradly v. Westcott*,‡ *Lewis v. Lewellyn*,§ *Bennett v. Aburrow*,|| *Andrews v. Emmott*,¶ *Denn v. Roake*.†† On the second point they cited *Wright v. Atkins*,‡‡ *Cruwys v. Colman*,§§ *Macleroth v. Bacon*,||| *Brown v. Higgs*,¶¶ and *Harding v. Glyn*.†††]

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Mr. Skirrow, contra :

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In all the cases, in which evidence has been received to shew that there was no property to answer a devise, *except the subject of the power, the question related to freehold lands; and the same rule does not extend to chattel interests or personalty.

If the evidence be rejected, which has been entered into in order to shew that the testatrix had no leaseholds of her own, there will remain no reason to believe that either the power or the subject of it was present to her mind, when she made this will. Besides, the leasehold is comprised in the same clause with "monies, goods," &c., and, along with them, is made liable to the payment of her debts, and funeral and testamentary expenses. Such a charge of debts is wholly inconsistent with an intention to exercise her power.

Even if the will is an exercise of the power as to the leasehold,

† See 23 R. R. 202, n. (2 Ves. Jr. 589).

‡ 9 R. R. 207 (13 Ves. 445).

§ 23 R. R. 201 (T. & R. 104).

|| 7 R. R. 131 (8 Ves. 609).

¶ 2 Br. C. C. 298.

†† 5 Barn. & Cress. 720.

‡‡ 13 R. R. 199 (17 Ves. 255).

§§ 7 R. R. 210 (9 Ves. 319).

||| 5 R. R. 11 (5 Ves. 159).

¶¶ 4 R. R. 323 (4 Ves. 708; 5 Ves. 495).

††† See 4 R. R. 334, 338 (1 Atk. 469; 5 Ves. 501).

yet "family" must mean, according to its usual legal import, next of kin, unless something can be found on the face of the will, which shews that it is to be taken in another sense: and then the appointment will be void, as having been made in favour of a person, who, though of the family of the testator, is not one of his next of kin.

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LYNAM.

Mr. Phillimore, for a party in the same interest, cited *Nannock v. Horton*.†

THE MASTER OF THE ROLLS :

March 15.

It is well settled, that, if the donee of a power has no freehold estate, except that which is the subject of the power, the will of the donee, giving freehold estate, will be so far deemed an execution of the power; for *otherwise the will, as to that property, would wholly fail. There is no distinction between freeholds and leaseholds in the nature of the subjects; the difference is only in the quantity of interest: and there does not appear to me to be any solid ground, upon which it is to be maintained that a gift of leasehold, where the donee of the power has no other leasehold than the subject of the power, is not equally to manifest an intention to execute the power, as a gift of freehold under the same circumstances. A general gift of monies, securities for monies, and other personal chattels, which are in their nature subject to constant change and fluctuation, stands upon very different principles; and, as to them, the will must refer to them as the subjects of the power, or they will not pass.

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Upon the other point, whether the gift to John Grant is good, he not being one of the testator's next of kin, the leading case is *Harding v. Glyn*, imperfectly reported in Atkyns, but correctly referred to in other cases by Lord ELDON, Lord REDESDALE, and Sir W. GRANT. There the testator gave to his wife his house in Hatton Garden, and all the goods, furniture, and chattels therein at the time of his death; and also all his plate, linen, jewels, and other wearing apparel, and did desire her, at or before her death, to give the same unto and amongst

† 7 Ves. 391; see 23 R. R. 106.

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[*297]

such of his own relations, as she should think most deserving and should approve of. The widow, by her will, gave the house in Hatton Garden to Henry Swindale, and made no other disposition of the rest of the property bequeathed to her by her husband ; but, after giving some legacies, she gave in general terms the residue of her personal property to certain persons, whom she made her executors. Henry Swindale, to whom the House in Hatton Garden was given, was a relation of the testator, but not his next of kin. The *reported decision in that case is, that, as to the property of the husband not disposed of by the wife, the term "relations" should be construed as "next of kin;" and no notice is taken, in the judgment, of the house in Hatton Garden bequeathed to Henry Swindale. But, upon reference to the registrar's book, it appears that the gift to Henry Swindale was established. The principle, therefore, of that case is, that, where the author of the power uses the term "relations," and the donee does not exercise the power, there the Court will adopt the Statute of Distributions as a convenient rule of construction, and will give the property to the next of kin ; but that the donee, who exercises the power, has a right of selection among the relations of the donor, although not within the degree of next of kin.

I cannot find that the doctrine of that case has ever been impeached ; on the contrary, it has been repeatedly acted upon ; and the same rule has been applied with respect to personal estate, where the word "family" has been used in the place of "relations."

In addition to the cases which have been cited in the argument, I refer to the case of *Mahon v. Savage* (1 Sch. & Lef. 111). In the case of *Macleroth v. Bacon*,† Lord ALVANLEY, proceeding upon the special words of the will, considered a husband as one of the family of the wife ; and, in *Wright v. Atkins*,‡ Lord ELDON held, that, as to real estate, a direction to the donee to devise the property to the family of the donor, created a trust for the donor's heir as *persona designata*. But the cases do not break in upon the general rule, as I have stated it, with regard to personal estate : and I declare, therefore, that John

† 5 R. R. 11 (5 Ves. 159).

‡ 13 R. R. 199 (17 Ves. 255).

Grant is entitled to the leasehold dwelling-house of the testator, according to the terms and conditions of the will of the donee of the power.

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FLIGHT v. BOLLAND.

(4 Russ. 298—301.)

An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual.

1828,
Feb. 15, 19.
March 17.

Rolls Court.
LEACH, M.R.

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THE bill was filed by the plaintiff, as an adult, for the specific performance of a contract. After the suit was ready for hearing, the defendant, having discovered that the plaintiff was, at the time of the filing of the bill, and still continued, an infant, moved the Court, that the bill might be dismissed with costs to be paid by the plaintiff's solicitor. Upon that occasion the VICE-CHANCELLOR made an order, that the plaintiff should be at liberty to amend his bill, by inserting a next friend for the plaintiff; and the bill was amended accordingly.

Upon the opening of the case, a preliminary objection was taken, that a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.

Mr. Bickersteth and *Mr. Koe*, in support of the objection :

There is no instance of a decree for specific performance at the suit of an infant, and it would be contrary to the principles of a court of equity to entertain such a suit. * * At law, an infant may maintain an action for breach of a contract: *Warwick v. Bruce*;† but he has no remedy in equity.

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Mr. Pepys, *Mr. Morley*, and *Mr. Stuart*, for the plaintiff :

* * A party, who has signed an agreement, cannot enforce it against a party who has not signed it; and yet the latter may enforce it against the former: *Martin v. Mitchell*,‡ *Hatton v. Gray*,§ *Coleman v. Upcot*,|| *Buckhouse v. Crosby*,¶ *Owen v.*

† 14 R. B. 634 (2 M. & S. 205).

§ 2 Ch. Ca. 164.

‡ 22 R. B. 184, 194 (2 J. & W.
413, 426).

|| 5 Vin. Abr. 527, pl. 17.

¶ 2 Eq. Ca. Ab. 32, pl. 44.

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Davies,† *Seton v. Slade*,‡ *Western v. Russell*.§ The observations made by Lord REDESDALE *in *Lawrenson v. Butler*|| are not law. Mutuality of remedy, therefore, is not essential to entitle one party to file a bill for specific performance against another.

In *Clayton v. Ashdown*,¶ specific performance of an agreement made by an infant was decreed. In *Campbell v. Leach*,†† observations are made which amount to this, that it is not an objection to a bill for specific performance that the party, asking the aid of the Court, could not have been compelled to perform the agreement; and the instance of a contract between an infant and an adult is referred to as a case, in which the one is bound, though the other is not. In *Shannon v. Bradstreet*,‡‡ one of the objections taken by the defendant was, that there was not mutuality of remedy; and, the instance of a contract between an infant and an adult being mentioned, Lord REDESDALE said, "That case is no answer to the difficulty raised; it is the peculiar privilege of infants, for their protection, that, though they are not bound, yet those who enter into contracts with them shall be bound, if it be prejudicial to the infant to rescind the contract." The Court may refer it to the Master to inquire, whether it is for the benefit of the infant, that the agreement should be performed.

Mr. Bickersteth, in reply :

In *Clayton v. Ashdown* the infant had attained his full age, and had affirmed the contract, before the bill was filed. With respect to cases under the Statute of Frauds, if the party who has not signed the agreement files the bill, he gives the Court jurisdiction to bind him by the agreement; and from that moment there is mutuality of remedy: *Martin v. Mitchell*.§§ * * *

March 17. THE MASTER OF THE ROLLS :

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No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is

† 1 Ves. Sen. 82.

‡ 6 R. R. 124 (7 Ves. 265).

§ 13 R. R. 178 (3 V. & B. 187).

|| See 22 R. R. 188.

¶ 9 Vin. 393, pl. 1.

†† Amb. 740.

‡‡ 9 R. R. 11, 13 (1 Sch. & Lef. 52, 58).

§§ 22 R. R. 184, 195 (2 J. & W. 413, 427).

not disputed, that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the Court, although seriously questioned by Lord REDESDALE upon the ground of want of mutuality. But these cases are supported, first, because the Statute of Frauds only requires the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons apply to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion therefore is, that the bill must be dismissed with costs, to be paid by the next friend.

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v.
BOLLAND.

SMITH v. TOLCHER.

(4 Russ. 302—306.)

As a general rule, where land is agreed to be sold *tithe free*, the right to the *tithe* is to be considered so material to the enjoyment of the land, that a purchaser is not compelled to complete his contract with a compensation, if a good title cannot be made to the *tithe*; but this rule admits of exception, where the circumstances shew, that the right to the *tithe* did not form any inducement to the purchaser to enter into the contract.

1828.
Feb. 19.
Rolls Court.
LEACH, M.R.
[302]

THE bill was filed for the specific performance of a contract, made by the defendant, for the purchase of a mansion-house and lands, which, including offices, garden, and pleasure ground, contained, altogether, about nineteen acres.

In consequence of an advertisement describing the premises to the effect above stated, the agent of the purchaser, in a letter to the agent of the vendor, dated the 27th of August, 1825, proposed to purchase the property for the sum of 6,800*l*. These proposals the agent of the vendor, in a letter dated the 29th of August, accepted; and directions were given to prepare a formal

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contract. The agent of the vendor, upon a subsequent reference to the title deeds, found that the conveyance to the vendor included the great tithes of the nineteen acres; and, he having mentioned this circumstance to the agent of the purchaser, who was to draw up the formal agreement in writing, the latter introduced the great tithes as a part of the property purchased. The insertion of the great tithes either was not observed by the agent of the vendor, or was not objected to by him, because he considered them of no value, and that the vendor meant to sell all that was included in his own purchase; and an agreement, dated the 10th of September, 1825, and including the great tithes, was sent to and signed by the vendor and purchaser.

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No mention of tithes had been made, either in the advertisement, or in the correspondence between the *agents, in which the price and conditions of the agreement had been fixed; nor was any addition made to the price, in consequence of the tithes - being included in the formal contract.

Upon investigating the title to the great tithes, it appeared that the legal estate of one moiety of those tithes was vested in an infant; and on that ground the purchaser objected to complete the purchase. About twelve acres, out of the nineteen which were the subject of the purchase, were occupied by the mansion-house and offices, the garden, and pleasure grounds; and the remaining seven acres, which adjoined, were in pasture; and, consequently, there was little probability, that any great tithes could ever arise on the property. In a letter written by the solicitor of the purchaser, he admitted that the purchaser had changed his mind with respect to the purchase, and for that reason took the objection as to the great tithes.

The vendor, before the suit and in his bill, offered to make compensation for the value of the great tithes.

On the part of the defendant the case was fested, at the hearing, upon the ground, that it was now the settled rule of the Court, that tithes were not the subject of compensation.

Mr. Horne and Mr. Parry, for the plaintiff :

The nature of the property, the history of the agreement, the conduct of the parties, shew that the great tithes are not

essential to the enjoyment of the property which was the real subject of the contract. Here the land is laid out in pleasure-grounds, and is a mere appendage to the mansion-house. To break it up so as *to make it productive of great tithes, would lessen the value of the property. Tolcher bought the premises as a place of residence; and his objection is, that he finds he might be exposed to a small possible inconvenience, if he were to convert the property to a purpose totally inconsistent with that for which he bought it, and were to deal with it in a way which would destroy its value. The substance of the contract is to be found in the letters of the 27th and 29th of August, in which the price is fixed at 6,300*l*. Neither in these letters, nor in any step of the negotiation, did the parties consider themselves to be selling and buying great tithes; and when the tithes were included in the formal contract, no addition was made to the price which had been previously fixed, without reference to them. If they had been considered to be of any value or importance, some addition to the price would have been made, or, at least, would have been asked. Under these circumstances, they are a fit subject for compensation.

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Mr. Pepys and Mr. Swanston, for the defendant :

The agreement, of which the bill seeks to enforce performance, is not an agreement contained or supposed to be contained in the letters of the agents, but is to be found in the formal contract of the 10th of September, which expressly includes the great tithes. When a man buys an estate and the tithes of it, the law presumes that he would not have bought the estate without the tithes; the taking of tithes being an interruption of enjoyment, and an annoyance, which every one is anxious to avoid. He who sells an estate and the tithes of it, is bound to make a title both to the land and to the tithes; and if he cannot make a title to the tithes, a court of equity will not compel the purchaser to take the land, *and be satisfied with a compensation for the tithes: *Binks v. Lord Rokeby*,† *Ker v. Clobery*.‡

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† 19 B. R. 68 (2 Swanst. 222).

‡ Sugden's Law of Vendors.

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 TOLCHER.

THE MASTER OF THE ROLLS:

The rule of equity is, that, if a good title cannot be made to a part of the property agreed to be sold, and that part is material to the enjoyment of the remaining part, as to which a good title can be made, a purchaser shall not be compelled to take such remaining part with a compensation for the rest; it being reasonable to infer, that the purchaser would not have entered into the contract, if it had not included that material part. In opposition to prior authority the other way, it may be said to be now settled, that a man, who agrees to purchase a landed estate which is described to be tithe free, shall not be compelled to complete his purchase, if it turn out that the land is subject to tithe; it being considered as a general rule, that the right to the tithe is so material to the enjoyment of the land, as to have formed the inducement to the purchase. The good sense of this general rule is not to be disputed. But there may be cases of obvious exception to this general rule; and such a case actually occurred in *Binks v. Lord Rokeby*, before Lord Eldon, who is to be regarded as the author of the rule. A considerable landed estate was contracted to be sold tithe free, and a good title was shewn to all the tithe, except as to a very few acres; and Lord ELTON held, that the right to the tithe of these few acres could not be considered so material to the enjoyment of the rest of the estate, as to have formed the inducement to the purchaser to enter into the contract; and he compelled the purchaser to complete his contract, with a compensation for the value of those tithes, as to which the title was defective.

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To apply Lord ELTON's principle to the present case. Here the purchaser, by his agent, actually contracted to purchase the property at the agreed price, without the tithes; and the tithes were afterwards added to the written agreement by his solicitor, who prepared it, without any further treaty on the subject, and without any increase of the price. The right to the tithe could not possibly, therefore, be the inducement of the purchaser to enter into the contract. The tithes could have been omitted, by the vendor or his agent, in the description originally given of the property, and afterwards admitted into the agreement, only because they were substantially of no value; and it is not easy

to see how they can be of the value of the smallest piece of coin, since, as an appendage to the enjoyment of the mansion-house, there is no probability that the seven acres will ever be productive of great tithes. Upon the whole, the purchaser cannot be permitted to escape from his contract upon this pretence; but, the vendor having submitted to make him compensation for the value of the great tithe, let the Master ascertain that value, and let it be deducted from the purchase money.

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Decree with costs.

NEEDHAM v. SMITH.†

(4 Russ. 318—324; S. C. 6 L. J. Ch. 107.)

1828.
Feb. 26.
March 13, 14.

Rolls Court.
LEACH, M.R.
[318]

By covenant in a marriage settlement, the husband was bound to give by his last will or otherwise, to his children in equal shares all his real estates, other than a settled estate, and personal property: Held, that the covenant bound only such real estate as he should die seised of;

That the covenant bound shares of the settled estate, which the husband became entitled to by devise from a child, who died in his lifetime;

That children living at the death of the husband were alone entitled to the benefit of the covenant.

MR. JOHN NEEDHAM, upon his marriage with a second wife, settled a freehold estate, part of his property, to the use of himself for life; with remainder to the intent that his wife, if she survived him, might receive an annuity of 60*l.* during her life; with remainder to all his children, whether by his first wife or by his then intended wife, as tenants in common in fee. The settlement contained also the following covenant: "And the said John Needham, in consideration of the said marriage, and for other the considerations aforesaid, for himself, his heirs, executors, and administrators, doth hereby further covenant, promise, grant, and agree, to and with the said Charles Dodsworth and James Butler, their heirs, executors, and administrators, that, in case the said intended marriage shall take effect, and there shall be any issue of such marriage, then and in such case he, the said John Needham, shall and will, by his last will and testament or otherwise, give, devise, and

† *Re Brookman's Trust* (1869) L. R. 5 Ch. 182, 189; 39 L. J. Ch. 138.

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SMITH.

bequeath all other his real estates, and also all his personal estate and effects, whatsoever and wheresoever, unto and amongst all and every the children of his body, whether born of the body of his late wife Hester, or to be born of the body of the said Anne Burton his intended wife, and their heirs, executors, and administrators respectively, according to the nature or quality of such his estates, share and share alike, as tenants in common and not as joint tenants, except such part or parts thereof as he may hereafter give, devise, or bequeath unto, or to the use of the said Anne Burton."

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At the date of the settlement four children of the first marriage were living: and, by the second wife, Mr. Needham had six children.

Some time after his second marriage, Mr. Needham entered into a contract to sell to John Kirkman freehold property, to a part of which he was entitled at the time of the settlement, and other part of which he had subsequently acquired. The purchaser objecting to the title, on the ground of the covenant in the settlement, Mr. Needham filed his bill in the Court of Chancery for a specific performance of the contract. On the hearing of that cause, the VICE-CHANCELLOR sent a case to the Court of King's Bench: and in that case, which stated that there were children both of the first and of the second marriage then living, the question for the opinion of the Court was, "Whether, in case John Needham should depart this life, leaving such children as aforesaid, without having procured a re-conveyance of the lands and tithes so sold and conveyed to John Kirkman, so that he should be unable, by his last will or otherwise, to give, devise, or bequeath the same to and amongst his children, he would be guilty of a breach of the covenant entered into by him in his said settlement, to give, devise, and bequeath, by his last will or otherwise, all other his real estate as therein mentioned."

Upon this case, which is reported under the name of *Needham v. Kirkman*,† the Judges certified, that, in the event mentioned, Mr. Needham would not be guilty of a breach of the covenant.

[*320] Robert, the eldest of the sons of Mr. Needham by his first marriage, having died intestate in his father's lifetime, *his

† 3 B. & Ald. 531.

expectant share of the settled estate descended to his next brother, Edward, who afterwards died also in his father's lifetime, having devised the share so descended to him, as well as his own original expectant share, to his father in fee.

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Elizabeth, a daughter of the first marriage, married, and died in her father's lifetime, leaving an infant son.

Mr. Needham survived his second wife; and by his will devised the two shares of the settled estate, which had been devised to him by his deceased son Edward, to a trustee upon certain trusts, under which none of his children, except one, took any benefit. At his death, there were five children of the second marriage alive, and one child of the first marriage.

The bill was filed by the surviving children of the second marriage, to have the benefit of the covenant with respect to these two shares of the settled estate.

There were two questions in the cause :

First, whether the devise of the two shares of the settled estate, which the father derived from his son, was a breach of the covenant in the settlement :

Secondly, whether the covenant was to operate for the benefit only of children who were alive at the death of the father, or also of the representatives of children who died in his lifetime.

Mr. Preston and Mr. Temple, for the plaintiffs [relied on *Needham v. Kirkman*,† in the Court of King's Bench].

Mr. Whitmarsh, for the devisee in trust.

[322]

Mr. Pepys, for the child, who claimed beneficially under the devise of the father :

In *Needham v. Kirkman*, the Court of King's Bench decided nothing more than this,—that the covenant did not affect property, being no part of the settled estate, which the settlor alienated in his lifetime. That decision does not touch the question, whether the covenant affects a share of the settled estate, which the settlor derived subsequently from the gift of

† 3 B. & Ald. 531 and see *Jones v. Martin*, 5 R. B. 32.

NEEDHAM
v.
SMITH.

those who acquired their interest solely under the settlement. The deed of settlement describes certain real estates, and creates a series of limitations with respect to them, after which the settlor covenants to give and devise, by his last will or otherwise, all other his real estates—that is, all estates other than those previously described. The plain interpretation of the words protects the lands in question, which are not other than the lands specified in the deed, but are a portion of those very lands, from the operation of the covenant.

Mr. Tamlyn, for the son and heir of the deceased daughter, argued that he, as the representative of his mother, was entitled to a share of that portion of the settled estate which Mr. Needham had devised.

Feb. 26.

THE MASTER OF THE ROLLS :

This point has, in fact, been decided by the Court of King's Bench. The only ground upon which their judgment could have proceeded, is, that the covenant in *question neither bound the real estate of which Mr. Needham was seised at the time of the settlement, nor any subsequently acquired real estate, unless it continued to be his property at the time of his death : and to that conclusion I should have come without the advantage of this prior decision. All real estate of which he was seised at his death, is bound by his covenant.

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A distinction has been taken in the argument, because the property, thus devised, consisted of the shares of two of the sons in the settled estate. There is certainly some singularity in the circumstance ; but what difference can it make in principle ? The father being bound by his covenant to give equally to all his children such property as he should be entitled to at his death, the manner in which he acquired that property must be wholly indifferent.

The children at the death of the father are to take by his gift, and must necessarily be children living at his death, and then capable of taking. The heirs of the children who died in the lifetime of the father, can have no benefit from this covenant ; and it makes no difference that one of these children left a child.

It is true that the words of the covenant are, that the father is to give by his will or otherwise: but he could not in any manner have conferred an interest, under the covenant, upon the representatives of a child not living at his death.

NEEDHAM
v.
SMITH.

In consequence of permission given by the COURT, upon an application made on behalf of the infant son of the deceased daughter, the last point was argued a second time.

March 13.

Mr. Tamlyn cited *Emperor v. Rolfe*,† *Cholmondeley v. Meyrick*,‡ *Hope v. Lord Clifden*,§ and *Bradish v. Bradish*.|| [324]

Mr. Preston, *contra*.

The MASTER OF THE ROLLS confirmed the judgment which he had pronounced before.

March 14.

CLIFFORD v. BEAUMONT.

(4 Russ. 325—328.)

A testator gave to his daughter a legacy of 10,000*l.*, “payable and to be paid unto her in manner following, viz. a sum of 5,000*l.* upon her marriage under twenty-one, with the consent of his trustees, and the sum of 5,000*l.*, within two years afterwards.” The daughter married under twenty-one, without consent of the trustees; and, her first husband dying, she married a second husband at the distance of thirty years from her first marriage:

Quære, if, on such second marriage, she became entitled to the 10,000*l.*

THE testator, Sir Thomas Blackett, by his will, among other things, gave to his daughter Louisa a legacy of 10,000*l.*, “payable and to be paid to her in manner following; that is to say, the sum of 5,000*l.* upon her marriage, (with such consent and approbation as aforesaid,) and the sum of 5,000*l.* within two years afterwards.” The consent and approbation referred to was expressed in a former part of the will, where certain real estates were devised in remainder to the use of the daughter

1828.
March 10.
Rolls Court.
LEACH, M.R.
[325]

† 1 Ves. Sen. 208.

§ 5 R. R. 364 (6 Ves. 499).

+ 3 Br. C. C. 253, in the note, and
1 Eden, 77.

|| 12 R. R. 109 (2 Ball & B.
479).

CLIFFORD
 v.
 BEAUMONT.

Louisa, "or such person as she shall first intermarry with, if any, (if, before she attain the age of twenty-one, by and with the consent and approbation of John Erasmus Blackett and Thomas Cotton, or the survivor and his heirs, and which person shall also previously make a competent settlement on her my said daughter Louisa, by deed or deeds in writing, to the like approbation of the said John Erasmus Blackett and Thomas Cotton), &c."

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The daughter Louisa, now the plaintiff Mrs. Clifford, intermarried, before she attained twenty-one, with Mr. Stackpole, without the consent and approbation required: and afterwards, she, with Mr. Stackpole, filed their bill in this Court, claiming the legacy of 10,000*l.*, and the other provisions made for her by the will. In that suit, which came on to be heard before Lord Rosslyn, and is reported under the name of *Stackpole v. Beaumont*,† it *was declared, that she was not entitled to the legacy of 10,000*l.*

Mr. Stackpole the husband having died, the plaintiff Mrs. Clifford, at the distance of about thirty years from the first marriage with Mr. Stackpole, intermarried with the co-plaintiff Mr. Clifford; and the present bill was filed, claiming the legacy of 10,000*l.*, upon the ground that the legacy was payable to her upon marriage generally, and that the consent and approbation required applied only to a marriage under twenty-one.

Mr. Sugden and Mr. Lynch, for the plaintiffs :

The testator has bequeathed to his daughter Louisa 10,000*l.*, of which 5,000*l.* is to be paid on her marriage, and the remainder two years afterwards; but he provides by a parenthetical clause, that, if she marries under twenty-one, the marriage must be with the consent of certain persons. She married under twenty-one without the required consent. Marriage under that age, without consent, was not such a marriage as entitled her to receive the legacy; and so Lord Rosslyn held. Now the state of circumstances is altogether different; and the question raised is one which that Judge could not consider. The lady, having

† 3 R. R. 52 (3 Ves. 89). In that report, the will, on which the question arises, is stated at length.

long since attained twenty-one, has married Mr. Clifford; and that marriage entitles her to the legacy.

CLIFFORD
v.
BEAUMONT.

If for the words ("with such consent and approbation as aforesaid") we substitute the preceding clause to which they refer, the bequest will run thus: "I give 10,000*l.* to my daughter Louisa, to be paid to her in manner following; that is to say, the sum of 5,000*l.* upon her marriage (if before she attain the age of twenty-one, by and with the consent and approbation *of John Erasmus Blackett and Thomas Cotton), and the sum of 5,000*l.* within the two years next afterwards." The effect of the words, according to their natural and grammatical construction, is—not to limit the bequest to the event of the legatee's marrying under twenty-one—but to annex a condition to the gift, in the event of the marriage taking place during infancy. It is not a very probable intention to impute to a testator, nor one very consistent with the scheme of this will, to suppose that the daughter was not to receive the legacy, unless she married under twenty-one.

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The argument in *Stackpole v. Beaumont* turned exclusively on the effect of the annexed condition in the event of marriage under twenty-one; and Lord Rosslyn speaks of the condition as operating only up to that age. He states the question to have been, whether the lady had put herself in a situation to answer the description of the person to take; and he decided that she had not done so. But, in the altered state of circumstances which now exists, the event has happened, on which the legacy was given to her; for the money was to be paid to her on her marriage; and, the age of twenty-one being attained, the condition, which affected marriage during her minority, has no operation.

Mr. Horne, Mr. Pepys, and Mr. Knight, contra :

The legacy is expressly directed to be paid on marriage with the specified consent and approbation; and the argument on the other side is, that it is to be paid merely on marriage. That construction strikes out plain and important words. There is no necessity that the condition, requiring consent and approbation, should be limited to marriage during the infancy of the legatee;

CLIFFORD ^{v.} BEAUMONT. [*328] but if it be so limited, what could be a more *probable intention than that the testator should have said, "I give you a certain legacy, if you marry before twenty-one, with the approbation of those in whom I have reposed confidence; but you shall not enjoy that benefit, if you marry without their consent, whether such marriage takes place without their approbation during the period to which their authority extends, or after that period has expired." If the daughter Louisa did not become entitled, when her first marriage took place, it is a fantastical construction to say, that her second marriage, thirty years afterwards, can give her a new right.

THE MASTER OF THE ROLLS :

I cannot read the judgment of Lord ROSSLYN in the case of *Stackpole v. Beaumont* without coming to the conclusion, that the principle upon which he decided that case, necessarily determines the present question. His opinion plainly was, that the legacy was given to the lady only in the event of her marrying under twenty-one, with the consent and approbation of his trustees, and that, such consent not having been given, she could not be entitled to the legacy. It would not become this Court to adopt a different conclusion, unless it considered the case very clear the other way; and I cannot say that it is clear that the testator meant to give the sum generally as a marriage portion, with this restriction only, that a marriage under twenty-one should not entitle her to it, unless it were had with the consent and approbation of his trustees. This is certainly not the natural effect of the language he has used; and he may well have intended this legacy as a bounty upon a marriage with consent under twenty-one. I must leave the parties, therefore, to review Lord ROSSLYN's judgment, if they think fit, before a higher tribunal.

Bill dismissed without costs.

FRANCIS v. COLLIER.†

(4 Russ. 331—333.)

1828.

March 10.

Rolls Court.

LEACH, M.R.

[331]

A testator, in the case of an event which happened after his death, directed a freehold estate to be sold, and the produce applied upon the trusts, intents, and purposes afterwards expressed in his will, as to his residuary personal estate: by a codicil, he revoked the gift in his will of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents, and purposes, which were expressed in the will as to the residuary personal estate.

THE testator, Joseph Shepherd, by his will devised certain freehold property to his daughter Hannah for life, with remainder to her children, in manner therein mentioned; and he directed, that, after Hannah's death, the freehold property, in case she left no child who should become entitled to it under the limitations contained in his will, should be sold by his trustees, and the produce applied upon the trusts, intents, and purposes thereafter expressed of and concerning his residuary personal estate. By a subsequent clause in his will, he gave his residuary personal estate upon certain trusts, for the benefit of six of his daughters and their husbands and children, including his daughter Hannah, but excluding altogether a seventh daughter of the name of Sarah.

The testator by a codicil, executed and attested so as to pass freehold estates, altogether revoked the bequest in his will of his residuary personal estate, and directed such residuary personal estate to be divided into seven parts, and gave six of such parts absolutely to the six daughters named in the residuary clause in his will; and the other seventh part he gave to trustees, upon certain trusts, for the benefit of his daughter Sarah and her children.

The daughter Hannah survived the testator, and afterwards died, leaving no child to take the benefit of the provisions in the will as to the freehold property devised to her for life: and the question in the cause was, whether the produce of that freehold property, which, in the events that had happened, had been sold

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† *Bridges v. Strachan* (1878) 8 Ch. D. 558; *In re Towry's Settled Estate* (1889) 41 Ch. D. 64; 58 L. J. Ch. 593; and see *Carrington v. Payne*, 5 R. B. 87 (5 Ves. 404), not cited here.—O. A. S.

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v.
COLLIER.

according to the directions of the will, was or was not to be considered as passing under the codicil by the revocation of the residuary clause in the will, and by the effect of the new residuary clause contained in the codicil.

*Mr. Pepys and Mr. Jeremy, for the plaintiffs. * * **

Mr. Bickersteth and Mr. Knight, contra :

The trusts declared in the will concerning the personal estate are annihilated by the codicil, as completely as if the words expressing them had been obliterated. The operation of the codicil is, that the will, taken by itself, and as distinguished from the codicil, contains no operative trusts of the residuary personal estate ; those trusts are to be found only in the codicil ; and, the codicil being, in effect, a part of the will, and the trusts of the produce of the real estate being identified with the trusts of the residuary personal estate, the produce of the real estate must pass according to the trusts contained in the codicil.

Mr. Simons, Mr. Phillimore, Mr. Collinson, and Mr. Lynch, for other defendants.

[333] THE MASTER OF THE ROLLS :

When the will gives the produce of this freehold property upon the trusts, intents, and purposes which were expressed in the will as to the residuary personal estate, the effect is the same as if those trusts, intents, and purposes had been immediately repeated, and applied in terms to the produce of the freehold estate. If such had been the case, it is obvious that the revocation, by the codicil, of the residuary gift of the personal estate by the will, would have been no revocation of the disposition of the produce of the freehold estate ; and it can make no difference in principle, that the testator saves himself the trouble of repeating those trusts, intents, and purposes by compendious words of reference. The produce of the freehold estate remains, therefore, unaffected by the codicil, and must still be applied upon the trusts, intents, and purposes, which were expressed in the will as to the residuary personal estate.

SELBY v. SELBY.

(4 Russ. 336—341; S. C. 6 L. J. Ch. 117.)

1828.

Rolls Court.

LEACH, M.R.

[336]

Marshalling assets.

If the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate.

[THE point decided in this case is practically concluded by Locke King's Acts (see 40 & 41 Vict. c. 34), but the following passage from the judgment of the MASTER OF THE ROLLS is retained as illustrating the equitable doctrine of marshalling assets as against devisees.—O. A. S.]

Here the question is between devisees of purchased estates and simple contract creditors; and,—the established rule being, that simple contract creditors are, as against a devisee, to stand in the place of specialty creditors who have exhausted the personal assets, because the specialty creditors had the two funds of real and personal estate to resort to,—so the simple contract creditors here are entitled to stand in the place of the vendor against the devisees, because the vendor has equally a charge upon the double fund of real and personal estate.

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If the charge of the vendor is to be considered in the same manner as if it were secured by mortgage, then a pecuniary legatee would have the same benefit from the vendor's lien: it being now the settled law of the Court, that, if the real estate devised be subject to a mortgage, and the mortgagee exhaust the personal assets, a pecuniary legatee shall stand in the place of the mortgagee upon the devised estate. The present case, however, does not call for a decision upon that point.

1828.
March 14.

Rolls Court.
LEACH, M. R.
[342]

INGLEBY *v.* DOBSON.

(4 Russ. 342—344.)

A school-house, built prior to the Act 9 Geo. II. c. 36, on waste of a manor given by the lord for that purpose, and paid for by subscriptions from the lord of the manor and other parishioners, and never subsequently used otherwise than as a public school-house, is so dedicated to charity, and in mortmain, that a bequest for the purpose of repairing and enlarging it, and of providing a salary for a schoolmaster, is a valid legacy.

THE testator in this case gave a sum of 2,000*l.* in trust for the purpose of rebuilding or enlarging an old school-house then existing in the town of Stokesley, or of building a new school-house in the same parish. The surplus of the 2,000*l.* was to be applied by way of emolument for a schoolmaster; and the will described the number and description of the scholars who were to be taught.

At the hearing of the cause before Lord Gifford, he referred it to the Master to inquire whether the old school-house, in the will mentioned, had been, in any and what manner, and by whom, appropriated to charitable purposes, and whether the same was in mortmain at the death of the testator.

The Master found that the school-house had not been appropriated to charitable purposes, and was not in mortmain at the death of the testator. To this report an exception was taken, which now came on to be heard.

It appeared upon the evidence before the Master, and the facts were not disputed, that this school-house was built, in 1734, and, therefore, two years before the statute 9 Geo. II. c. 36, upon waste of the manor, which was then given by the lord of the manor for that purpose; that the expense of the building was discharged by the subscriptions of the lord of the manor and the other inhabitants of the parish; that the lord of the manor, *during a considerable period, allowed a sum of 25*l.* a year for a schoolmaster, and that, some years afterwards, another person had given by his will 40*s.* a year towards the maintenance of the schoolmaster, though, latterly, that sum had not been paid; that the building had not been applied to any other purpose than as a school, except that the schoolmaster had at one time

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occupied an upper apartment in it rent free, and that sometimes there had neither been schoolmaster nor scholars; and that the scholars, when there were any, made some payments for their instruction.

INGLEBY
v.
DOBSON.

Very shortly before the institution of this suit, the present lord of the manor had brought an ejectment to recover the possession of the school-house from a woman who had been named school-mistress by the parishioners, but had at the time no scholars; and she, being too poor to stand the expense of litigation, gave up the possession to the lord of the manor, who stated, in an affidavit before the Master, that he had brought such ejectment, not with a view to claim the school-house as his property, but in order to facilitate the object of the will of the testator in this cause, by putting his trustees in possession of the premises.

Mr. Bickersteth and Mr. Knight, for the exception.

Mr. Preston and Mr. Pemberton, contra:

That, for a number of years, the building has not been treated as private property, but has been occasionally used as a school, sometimes of one sort, and sometimes of another, is not a sufficient ground for the Court to say, that the land was appropriated to charity and was in mortmain at the death of the testator. No conveyance of the school-house is produced, nor any instrument shewing an appropriation of it to charity; and *the presumption of any conveyance is repelled by the Master's report, and the circumstances stated in it. There is no declaration in writing which could create a trust; nor is there any certainty in the charitable trust which the Court is required to raise by mere conjecture. To what particular purposes is the school to be devoted? Who are to enjoy the benefit of it? What are to be the qualifications of the master? By whom is he to be appointed? The very evidence, on which the exceptant relies, shews, that there is no certainty in the supposed charitable trust; for the building has been used sometimes as a school for boys, and sometimes as a school for girls; to-day it has been under a master; to-morrow, under a mistress; at one time the

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INGLEBY master has been nominated by the minister of the parish, at
 v. another time by the vestry : *The Attorney-General v. Hewer.*†
 DOBSON.

THE MASTER OF THE ROLLS

Allowed the exception ; stating that, upon the admitted facts, the school-house was plainly dedicated to the public purpose of a school, and was therefore a charitable establishment, and in mortmain, at the death of the testator ; that no individual could claim property in it ; and that, if the lord of the manor had asserted a hostile claim to it, it would have been the duty of the Attorney-General to have resisted that claim.

1828.

March 18, 19.

Rolls Court.

LEACH, M.R.

[348]

THOMAS v. PHELPS.

(4 Russ. 348—351 ; S. C. 6 L. J. Ch. 110.)

A gift to A. and B., “whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be,” will pass the fee simple of real estate.

THIS was a bill filed for a partition of land claimed by the plaintiff, late Elizabeth Phelps, but now married to the other plaintiff Thomas, under the will of her late father. The father began his will by stating, “As touching such worldly estate, wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner.” He then gave several pecuniary legacies, after which the will proceeded in these words : “I also give and bequeath the lease of the colliery of Landigwynet to my son James Phelps : him and my daughter Elizabeth Phelps I do make, constitute, and appoint my joint executor and executrix of this my last will and testament, of all that I possess in any way belonging to me, by them freely to be enjoyed or possessed, of whatsoever nature or manner it may be, only my household furniture, which I give to my daughter who lives the longest single, and, after her decease or marriage, to be sold, and equally divided between my remaining

† 2 Vern. 387.

children: and if my daughter Elizabeth Phelps, one of my executors, do, at any time ever hereafter, marry Robert Davies, she is to be excluded of being one of my executors, and to be cut off with one shilling."

THOMAS
v.
PHELPS.

The question in the cause was, whether, under the clause above stated, Elizabeth Phelps took any, and what, interest in the real estate of the testator not otherwise disposed of.

Mr. Bickersteth and *Mr. Wilson*, for the plaintiffs, contended that the fee-simple of a moiety of the residuary *real estate of the testator, passed by the will to the daughter Elizabeth. * * *

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Mr. Treslove and *Mr. Martin*, for the heir :

The gift being to Elizabeth only as executrix, she can take nothing but personal property. The testator makes her and James executrix and executor of "all that I possess ;" a mode of expression wholly inapplicable to freehold estate ; and the bequest is modified immediately afterwards by an exception of various personal chattels. Such expressions shew, that the testator had not real estate in his contemplation, when he framed this part of his will. * * *

[The judgment did not refer to any of the numerous old cases cited by counsel, and the Wills Act has made further reference to the principal cases cited unnecessary.]

THE MASTER OF THE ROLLS :

March 19.

This is the will of a person who had not the advantage of professional assistance, and was plainly ignorant of the nature and character of the office of executor, and of the distinction between real and personal estate, as it regards that office. His purpose was, to make a gift to his son James and his daughter Elizabeth ; *and the subject of his gift is, "all that he possessed, in any way belonging to him, by them freely to be enjoyed or possessed, of whatsoever nature or manner it might be." These words are equivalent to a gift of all his property : and a gift of all property will not only pass real estate, but will pass all the interest of the testator in that estate. The exception of the

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THOMAS
v.
PHELPS.

household furniture is of little weight here; as the prior words clearly import real as well as personal estate, it matters little that the exception to the gift happens to be of personal chattels.

1828.

March 21.

Rolls Court.

LEACH, M.R.

[352]

SMITH v. ANDERSON.

(4 Russ. 352—359; S. C. 6 L. J. Ch. 105.)

Where a testator gives annuities, and directs them to be paid without any deduction whatsoever, and where, from the nature of the property out of which the annuities are to be paid, there could be no deduction, except in respect of the legacy duty,—there the annuities shall be paid clear of legacy duty.

THE testator by his will gave, first, some legacies, and then certain annuities; and he directed that “all the said annuities should be charged upon and issuing out of all and singular his leasehold estates, and be paid to the respective annuitants without any deduction or abatement out of the same, on any account or pretence whatsoever.” By the residuary clause he directed that the residue of his personal estate, other than his leaseholds, should be converted into money; that, in the first place, his debts and funeral and testamentary expenses should be paid out of the proceeds thereof, and that the surplus should be invested in the funds or upon real security; and that his trustees should stand possessed of the stock or money, and of all his leasehold estates, upon trust, out of the dividends, interest, rents, and income thereof, to pay the ground rents and other payments to which the leasehold estates were or might be subject or liable, including the expense of insuring the premises from fire, and of keeping them in good repair and condition; and also to pay the several annuities thereinbefore given and charged upon the said leasehold estates; and to apply the surplus upon other trusts therein mentioned.

The testator made several codicils to his will, in which he altered the amount and number of the annuities, but always referred to them, with trifling variations of expression, as annuities to be paid without any deduction.

The bill was filed by the annuitants claiming their annuities, without any deduction in respect of the legacy duty.

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v.
ANDERSON.
[353]

Mr. Lovat, for the plaintiffs, cited *Barksdale v. Gilliat*.†

Mr. Lee, *contra* :

In *Hales v. Freeman*,‡ a legatee, to whom an annuity was given “clear of all deductions,” was compelled to refund the amount of the duty to the trustee; and “clear of all deductions” are expressions equivalent, in effect, to “without any deduction or abatement.” Here the direction that the annuities should be paid without deduction or abatement, may be satisfied by a reference to the deduction or abatement to which they might be exposed, in consequence of the rents and other payments to which the leaseholds were liable. It is observable, that the testator in the residuary clause has specified various particular payments which are to be made out of his general residuary personal estate and leaseholds: if he had intended that the fund should be burdened with the legacy duty, in addition to the annuities, is it not likely that the legacy duty would have been mentioned, as well as other less important charges which he has enumerated?

THE MASTER OF THE ROLLS :

In the case of *Hales v. Freeman* there were words, which, although less strong than the words used in the present case, might have raised a similar question. But, upon reading the report, it appears that these words were not noticed by either the bar or the Bench, and *that the argument and decision in that case proceeded upon a totally distinct ground.

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I admit that it is to be stated as the fair result of Lord ELDON’s judgment in *Barksdale v. Gilliat*, that he considered that a direction to pay annuities without deduction§ would not extend to exempt the annuitants from the legacy duty, if, from the nature of the property out of which the annuities were

† 18 R. R. 139 (1 Swanst. 562).

‡ 21 R. R. 663 (1 Brod. & B. 391).

§ See the judgment of Lord

BROUGHAM, L. C., *Louch v. Peters*
(1834) 1 Myl. & K. at p. 499.

SMITH
*,
ANDERSON.

payable, there was any other deduction to which the annuities might be subject. It is said that, in this case, there were such other deductions, because the leasehold estates were subject to ground rents and repairs and other expenses; and that it might be the intention of the testator, therefore, to declare, that the annuitants should not bear any proportion of these charges. In the first place, it is to be observed, that the leasehold estates were the secondary, and not the primary fund out of which the annuities were payable; the income of the residuary personal estate, other than the leaseholds, being the primary fund. But what is of much more importance here is, that the testator has directed that all charges, to which the leasehold estates were or might be liable, including the expense of insurance, should in the first place be paid out of the income of his residuary estate, and before the annuities were to be paid. He could not, therefore, have in his contemplation any deductions which might arise in respect of charges on the leasehold estates.

Let it therefore be declared, that the annuitants are to be paid by the trustees and executors, without any deduction in respect of the legacy duty.

KENDALL *v.* KENDALL.†

(4 Russ. 360—371; S. C. 6 L. J. Ch. 111.)

1828.
March 19, 24.Rolls Court.
LEACH, M.R.

[360]

Whether stock will or will not pass under the word “monies,” or under the word “goods,” or under the word “chattels,” depends upon the whole context of the will.

The word “goods,” and equally the word “chattels,” used simply and without qualification, will pass the whole personal estate, including stock.

A bequest of “all monies, goods, chattels, clothing, &c., the testator’s property, which may remain after paying his funeral charges and debts,” will pass the testator’s interest in stock and money.

[RICHARD KENDALL made his will, dated the 12th of April, 1826, in the following words:]

“First, at my death I give and bequeath to Susannah Jane Kendall, my beloved wife, the sum of 150*l.* per annum during her natural life, as I am empowered to do by the will of my late beloved father William Kendall, bearing date the 6th day of April, 1816, to be paid by the executors of the said William Kendall deceased. Second, I also bequeath to my said wife all monies, goods, chattels, clothing, &c., my property, which may remain after paying the charges incident to my funeral and such debts as I may owe at my death. Third, it is my wish to make and ordain my dear brother William Kendall the sole executor of this my last will.”

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Richard died shortly afterwards without issue, and leaving his widow and his brother William him surviving. * * *

[The bill was filed by William Kendall, for the purpose of having the rights of parties, claiming under the will of Richard, declared, and for other purposes.]

William, the executor of Richard, claimed, as such executor, [certain] stocks in which Richard took an interest under his father’s will.

The widow of Richard, on the other hand, insisted, that the whole of the personal estate of Richard, including those stocks, was expressly bequeathed to her; or at least, that, if she did not take the whole, she was entitled to an annuity of 150*l.* a year issuing out of those stocks. [It is unneces-

† *Avison v. Simpson* (1859) 1 John. 43, 46.

KENDALL sary to retain that portion of the report which relates to the
 KENDALL annuity.]

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Mr. Pepys and Mr. Randall, for the plaintiff:

* * The bequest, which follows, is not a disposition of all his personal estate, but is a specific gift of certain species of property, in none of which is stock included. "Money" will not pass stock; neither will "clothing;" "goods and chattels," in their proper sense, refer only to moveables, and do not include stock. But even if they were sufficient, when standing alone, to pass stock, they cannot have that effect here. For it is clear that they are not intended to denote personal estate generally; [*364] *since they are both preceded and followed by words descriptive of particular species of personalty, and, therefore, are to be taken in such a limited sense as will not comprehend the articles described by those precedent and subsequent words. "Goods, chattels, and clothes," will not pass stock: much less will "goods, chattels, clothing, &c.;" for the "&c." is an additional proof that the testator did not conceive that he had used any words which would include all his personal estate; and it is added in order to pass things *ejusdem generis* with the particular species of things before enumerated: *Ommanney v. Butcher*,† *Hotham v. Sutton*,‡ *Crichton v. Symes*.§

Mr. Horne and Mr. Wakefield, for the widow of Richard Kendall:

The words "goods and chattels" are sufficient to pass the testator's interest in the stocks in question and all the rest of his personal estate. * * In this will there is nothing to control the operation of the general words. On the contrary, the circumstance that the bequest to the wife is made subject to the payment of the testator's debts and funeral expenses, is a strong indication of his purpose to give her all his personal estate. * * *

[365] *Mr. Lynch, Mr. Stinton, and Mr. Campbell, for other parties.*

† 24 R. R. 42 (T. & R. 260).

§ 3 Atk. 61.

‡ 10 R. R. 83 (15 Ves. 319).

THE MASTER OF THE ROLLS [after disposing of a question to which it is unnecessary to refer here, continued as follows:]

It is argued for the executor, that stock will not pass either by the word "money," or by the word "goods," or by the word "chattels;" and that the word "&c.," following clothing, must refer to things *ejusdem generis* with clothing; and cases are referred to as affording these conclusions. It is true, that, upon the whole context of particular wills, it may be clear that stock was not intended to pass, and therefore will not pass, by any one of the words here used: but it is equally true, that, upon the whole context of other wills, stock may pass by any one of the words here used, except the word "clothing." In the case of *Legge v. Asgill*,† which was before me in the Vice-Chancellor's Court, and to which I may refer as an authority, as my decree was, upon appeal, affirmed by Lord ELDON, I held, that an interest, which a testatrix had in a sum of 2,500*l.* under the mother's settlement, in case it were not otherwise appointed by the mother, would pass by the words "if there should be any money left." I think this sum of 2,500*l.* (part of a sum of 10,000*l.*) was actually invested in stock, though this fact, not being considered material, does not appear in the report. But I am quite sure, that neither upon the principle upon which I decided that case, nor upon the principle upon which Lord ELDON affirmed it, would it have made the least difference in the judgment, whether the 2,500*l.* was or was not invested in stock.

The word "goods" and the word "chattels" come under a very different consideration. In the construction of wills of personal estate, the jurisdiction of courts of *equity being concurrent with that of the ecclesiastical courts, courts of equity follow the rule of the canon law, which is founded upon the civil law. By the canon law, the word "goods," and equally the word "chattels," taken simply and without qualification, comprise the whole personal estate of every description. This is distinctly stated in the 3rd vol. of Swinburn, 930: and a reference is made to cases in equity which seem to break in upon this position, shewing that such cases proceeded upon the particular

KENDALL
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† 24 R. R. 51 (T. & R. 285, n.).

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language of the wills upon which they arose. The question, therefore, in the present case is,—not whether the words used are sufficient to comprise stock,—but whether those words are by the context of the will so qualified, that an intention is manifested on the part of the testator to exclude stock.

To refer again to the words “all monies, goods, chattels, clothing, &c. my property,”—suppose the words “clothing, &c.” were not found in the will, it would not admit of argument, that “all monies, goods, and chattels, my property,” would pass the whole personal estate, including stock. Then what effect is the introduction of the words “clothing, &c.” to have? The words “&c.” are introduced to save further enumeration of particular species of property, and mean strictly “and the rest:” and the will is, therefore, thus to be read, “I give to my wife all my monies, goods, chattels, clothing, and all other things, my property.” The words “clothing, &c.” must be taken, therefore, to be introduced, not for the purpose of qualifying the general effect of the former terms, “monies, goods, and chattels,” but as resulting from the anxiety of the testator to enumerate every species of property which occurred to him, in order that the wife might take every thing which was his property.

* * * * *

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It is worthy of observation, that his gift to his wife is “of all monies, goods, chattels, clothing, &c. my property, which may remain after paying the charges incident to my funeral, and such debts as I may owe at my death.” The mention of debts and funeral expenses affords a strong inference, that he considered himself as disposing of that property, which by law was subject to those charges; viz. his residuary personal estate.

I must declare, therefore, that the wife is entitled to all personal estate, including stock, which the testator Richard had power to dispose of under his father’s will, or was possessed of at the time of his death.

— v. WALFORD.†

(4 Russ. 372—373.)

1828.
March 24.Rolls Court.
LEACH, M.R.

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If A., for valuable consideration, undertakes to surrender a copyhold to B., and B., on borrowing money from C., enters into a written agreement with C., that he, B., will surrender the same copyhold to C. by way of mortgage security, A. is not justified in refusing to surrender the copyhold to B., because he, A., has received notice from C. of the agreement between him and B.

The surrender by A. to B. does not prejudice, but promotes, that agreement.

THE plaintiff contracted to purchase from the defendant Walford a certain copyhold estate; but before any surrender was made by Walford, the plaintiff re-sold the estate to Curtis, and, upon that occasion, the defendant Walford executed a deed, engaging at the request of the plaintiff to surrender the copyhold to Curtis. Curtis, before any surrender made to him, borrowed a sum of money of a person of the name of Wright, and signed an agreement with Wright, undertaking to surrender this copyhold to Wright by way of mortgage for securing the money so borrowed. Curtis afterwards, and before the copyhold was surrendered to him, became bankrupt, and the defendant Davis was his assignee. Wright served Walford with notice of the agreement between him and Curtis, and required Walford to surrender the copyhold to him, Wright. The plaintiff required Walford to surrender the copyhold to Davis, the assignee of Curtis, in pursuance of the deed which Walford had executed; and, Walford refusing to make this surrender in consequence of the notice which he had received from Wright, the plaintiff filed the present bill against Walford and Davis, the assignee of Curtis, praying that Davis might pay to the plaintiff part of the purchase-money of the copyhold which remained due to him, and that thereupon Walford might surrender the copyhold to Davis.

The defendant Walford insisted that Wright ought to have been a party defendant to the suit, and that, after *the notice he had received from Wright, he could not with safety have surrendered the copyhold to Davis.

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† *Shaw v. Foster* (1872) L. R. 5 H. L. 329; 42 L. J. Ch. 49.

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If Curtis had entered into an agreement with Wright that Walford should surrender the copyhold to Wright instead of to Curtis, then, upon notice by Wright to Walford of that agreement, Walford could not with safety have surrendered to Curtis, and Wright would have been a proper party to this suit. But the agreement between Curtis and Wright being, that Curtis should surrender the copyhold to Wright, Walford was in no manner affected by that agreement, but ought to have made the surrender to Curtis, or to the defendant Davis, as the assignee of Curtis, at the request of the plaintiff, according to the effect of the deed which he had executed. The surrender of Walford to Davis would rather have promoted, than prejudiced, the agreement between Curtis and Wright; for Curtis or his representative could not surrender to Wright, until Walford had first surrendered to him. Wright, therefore, was not a necessary party to this suit, which being occasioned by the conduct of Walford, he must pay the costs of it.

1828.

March 25.

 Rolls Court.
 LEACH, M.R.

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HARDWICK v. THURSTON.†

(4 Russ. 380—383; S. C. 6 L. J. Ch. 124.)

A testamentary gift in default of appointment by a legatee for life does not fail by the death of the legatee before the testator.

A testatrix gives a legacy to the sole and separate use of her daughter for life, with a power of appointment, and in default of appointment, to her next of kin, "as if she had died sole and intestate, to the utter exclusion of her husband." This expression will not exclude a child of the daughter, but is to be considered as used for the sole purpose of excluding the husband.

THE testatrix, Martha Thurston, gave to trustees, named in her will, three several sums of money, to be invested in the public funds or upon real securities, upon trust, as to one third part thereof, for such person, or for such uses, trusts, and purposes, as her daughter Mary Salmon, the wife of Edward Salmon, should, notwithstanding her then present or future coverture, by

 † *Stoddart v. Saville*, '94, 1 Ch. 480; 63 L. J. Ch. 467.

deed or will appoint; and in default of appointment, upon trust to pay the dividends or interest into the proper hands of Mary Salmon during her life, for her sole and separate use, and not to be subject to the debts or control of her then present or any future husband; and from and after her decease, upon trust to assign the said trust monies to such person or persons as would have been entitled thereto, as her next of kin, at the time of her decease, under the statute for the distribution of intestate's personal estates, if she had died sole and intestate, to the utter exclusion of the said E. Salmon as her administrator, or by right of marriage or otherwise." Another third part of the said several sums of money she gave upon similar trusts, and subject to similar provisos, for the separate use of her daughter Mrs. Gwynn, and her appointees, "or such other person or persons in default of appointment, or as near thereto as the deaths of the parties, and other intervening circumstances would admit and allow." The remaining third part the testatrix gave "for similar trusts, ends, intents, and purposes, and with, under, and subject to similar powers, provisos, declarations, and directions, in every respect, for the separate use and benefit of my daughter Ursula Thurston, independent of any husband, and such her *appointee and appointees, or other person or persons entitled in default of appointment, as are hereinbefore respectively declared and contained of and concerning the said several hereinbefore-mentioned trust sums, for the separate use and benefit of my said daughters Mary Ann Salmon and Margaret Gwynn respectively, and the benefit of such appointee and appointees, or such other person or persons in default of any appointment, or as near thereto as the deaths of parties or other intervening circumstances will admit and allow."

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Ursula Thurston, the last mentioned daughter, was unmarried at the time the testatrix made her will; but she afterwards married, and died during the lifetime of her mother, leaving the infant defendant, Ursula Margaret Thurston Grove, her only child.

The question in the cause was, whether such child was, or not, entitled to the one third of the three several sums, which had been so given to her mother; or, whether that legacy

HARDWICK became altogether lapsed, by the death of Ursula Thurston
THURSTON. in the lifetime of the testatrix; or, whether it went to such persons as would have been next of kin of Ursula Thurston at the death of the testatrix, if Ursula had died intestate and without having been married.

Mr. Horne and Mr. Wilbraham, for the infant Ursula Margaret Thurston Grove.

Mr. Pepys, contra :

[382] * * This is in substance a gift to the daughter, only guarded so as to protect the legacy from the marital power of her husband. With the exception of the exclusion of the husband, the property is to go in precisely the same way as if it had been given to the daughter absolutely. Her next of kin were intended to take only in default of her exercising the power of appointment which was given to her; and by the death of the legatee in the lifetime of the testatrix, the whole of the gift must fail: *Tidwell v. Ariel*.†

Even if the words, “to such person or persons as would have been her next of kin, if she had died sole and intestate,” should be held to give an interest by way of remainder, distinct from the interest given to the daughter, yet the child cannot come within that description. The property, in effect, is directed to go in the same way as it would have gone if the daughter had not married: and, as in that case there could not have been a child of the daughter, the persons who are to take must be those who would have been the daughter’s next of kin, supposing she had died before her marriage.

THE MASTER OF THE ROLLS :

In the case of *Tidwell v. Ariel*, the legacy was, in the first place, given absolutely to the legatee, who died before the testator; and the limitation over, there contended for, was held to apply only to the death of the legatee, in case she survived the testator, and died within the year after the testator’s death. That case has no application here. In the present case the

† 18 R. R. 259 (3 Madd. 403).

daughters *have no absolute gift of their respective thirds of the trust-monies, but are merely tenants for life, with a power of appointment, with remainder, in default of appointment, to their next of kin. This is, therefore, the common case of the death of a tenant for life before the testatrix; and the remainder over takes effect upon the death of the testatrix.

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It is true that there are introduced the words, "as if she had died sole and intestate, to the utter exclusion of the husband:" but it must be considered that this expression was used for the sole purpose of excluding the husband, and was not intended to exclude a child in favour of other persons more remote and uncertain.

MOUNSEY v. BLAMIRE.†

(4 Russ. 384—387.)

1828.
March 25.

Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controlled by the context of the will; and the heir-at-law will take the legacy, and not the next of kin.

Rolls Court.
LEACH, M.R.
[384]

In such a case, it makes no difference that there are three co-heirs.

THE testatrix, by her will in this case, *inter alia*, devised a real estate to a person whom she described as her kinsman, and who was not her heir-at-law, and directed him to assume her name and arms. By a codicil to her will, she gave several pecuniary legacies, and amongst others, "to my heir 4,000*l*."

At the death of the testatrix, three persons were her co-heirs at law: and the question in the cause was, Who was to take this legacy?—whether the three co-heirs, or the next of kin, or the devisee of the real estates, who, it was argued, was *hæres factus*.

Mr. Bickersteth, for a person claiming to be heir *ex parte maternâ*, insisted that the testatrix plainly intended this sum as a legacy to a single individual; that, as she had three co-heirs

† *Smith v. Butcher* (1878) 10 Ch. D. 113; 48 L. J. Ch. 136; *Keay v. Boulton* (1883) 25 Ch. D. 212; 54 L. J. Ch. 48.

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at law, it would be uncertain whom she meant, if the word "heir" was to be understood as her heir-at-law, and that evidence was admissible to explain this latent ambiguity.

The MASTER OF THE ROLLS refused to admit the evidence; stating that the word "heir" was *nomen collectivum*, and would legally include all those who filled that character.

[*385] *Mr. Pepys*, for the heirs-at-law [cited *Gwynne v. Muddock*†].

Mr. Purvis, for some of the next of kin [cited *Holloway v. Holloway*,‡ and *Vaux v. Henderson*§].

[386] *Mr. Witham*, for others of the next of kin.

Mr. Barber, for the devisee. * * *

Mr. Phillimore, for the trustees.

Mr. Pepys, in reply :

In *Holloway v. Holloway*, the intention of the testator was, that, in the events which happened, the sum in question should revert to and be a part of his general estate. In *Vaux v. Henderson* the object was, if A. died before the testator, to substitute for A. those who might be his heirs ; that is to say, those who were his heirs to that particular species of property. Both these cases, therefore, are distinguishable from the present. If this legacy be given to the next of kin, a partial intestacy will be created ; and the bequest will, in fact, be a bequest to persons who would have taken the property without any gift.

March 26.

THE MASTER OF THE ROLLS :

There is no ground here for the claim of the devisee, or *haeres factus*, as he is called at the Bar. The question is between the co-heirs and the next of kin. In the construction of a will, every word is to be understood *in its legal and ordinary sense, unless

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† 9 R. R. 327 (14 Ves. 488).

§ 21 R. R. 193 (1 J. & W. 388, n.).

‡ 5 R. R. 81 (5 Ves. 399).

it be controlled by the context: and there is no expression in this will or codicil to control the natural and ordinary sense of the word "heir." It is said, that, the subject of the gift being money, the natural and ordinary sense of the word is thereby controlled, and it is necessarily to be inferred, that by the word "heir" the testatrix meant such persons as by law would inherit, not her real estate, but her money. This appears to me to be by no means a necessary inference. Why may it not be reasonably intended, that a testatrix, who gives to another that real estate which the heir would inherit, if she had not otherwise disposed of it, means to make him some compensation by a pecuniary legacy?

No authority has been cited which is expressly in point. Where the word "heir" is used to denote succession, there it may well be understood to mean such person or persons as would legally succeed to the property according to its nature and quality; as in *Vaux v. Henderson*, which has been principally relied upon in the argument; and in the familiar case of a gift of personal property to a man and his heirs. But where the word is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, there it seems to me to be a substitution of conjecture in the place of clear expression, if I am to depart from the natural and ordinary sense of the word "heir." The co-heirs, therefore, must take the 4,000*l.* as joint-tenants.

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BLAMIRE.

1828.
March 26, 27.
 1829.
July 11, 16.
 —
Rolls Court.
 LEACH, M.R.
 [388]

JERNINGHAM *v.* HERBERT.†

(4 Russ. 388—398; S. C. 6 L. J. Ch. 134.)

A testatrix gave such of her jewels, as should, at her death, be deposited in her jewel-box at Rundell and Bridge's, to persons whose names would be found written on a paper contained in the box, and bequeathed the rest of her jewels to A. B.; two years before her death she became the subject of a commission of lunacy, and no jewel-box was then, or at the date of her will, or at her death, deposited at Rundell and Bridge's, nor was there any written paper designating who were to take the jewels:—the intended gift of the jewels wholly fails.

A Scotch heritable bond, although it contained a personal obligation to pay the debt, does not lose its heritable quality, and will not pass by an English will, but descends to the heir-at-law.

THIS was a bill filed for the purpose of carrying into effect the trusts of the will of Mrs. Anne Frances Middleton, and now came on to be heard upon exceptions to the Master's report and for further directions.

The exceptions raised several questions upon the construction of the will, which were heard and disposed of separately, and, amongst others, the following question:—

The will of the testatrix contained the following bequest: "I give so much and such parts of my jewels, watches, trinkets, and other articles of dress and personal ornaments, which shall happen at my decease to be contained in my two jewel-boxes deposited by me at Messrs. Rundell and Bridge's, Ludgate Hill, to such persons as the same shall be found to be distributed in a paper written by me within such jewel-box; and as to all the rest of my jewels, watches, trinkets, and other articles of dress and personal ornaments, I give and bequeath the same to my daughter Louisa Anne Middleton, for her own absolute use and benefit for ever."

The testatrix, at the time of making her will, had no jewel-box at Messrs. Rundell and Bridge's; but she had a jewel-box then deposited with a banker. Shortly afterwards, and about two years before her death, a commission of lunacy issued against her; and her committee, *in March, 1818, deposited all her jewels, &c., at Messrs. Rundell and Bridge's; but, prior to her death, they were removed, under an order made in the

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† *Gill v. Bagshaw* (1866) L. R. 2 Eq. 746; 35 L. J. Ch. 842.

lunacy, to the Bank of England, where they remained at her death; and no paper was found containing directions as to the disposition of any part of them. JERNINGHAM
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The Master reported, that the jewels, trinkets, and other articles of personal ornament of the testatrix, which were deposited in the Bank of England at the time of her decease, were by her will specifically given to her daughter, Louisa Anne, who was now the widow of Mr. Herbert.

The plaintiffs, by their exception, insisted, that these jewels, trinkets, and other articles of dress and personal ornament, were not specifically bequeathed, but formed part of the testatrix's residuary personal estate.

Mr. Rose and Mr. Lynch, for the exception :

There was no intention to give more than a part of the jewels to Louisa; and unless that part can be ascertained, the bequest must fail. In order to ascertain what Louisa was to take, we must know what was contained in the two jewel-boxes deposited with Messrs. Rundell and Bridge; and as there was not, either at the death of the testatrix, or at the date of her will, any box in circumstances corresponding to those mentioned in the bequest, nor any paper writing such as the bequest-refers to, it is impossible to ascertain what that "rest" was, which Louisa was to take : *Peck v. Halsey*.†

The clause in the will is not a complete disposition of the jewels; it does no more than express an intention, *which was [*390] to be perfected by subsequent acts: those acts the testatrix has not done, either from having changed her purpose, or in consequence of the mental infirmity to which she became subject.

Mr. Pepys and Mr. G. Richards, *contra* :

The words amount to an immediate gift to Louisa; for they are, "I give all the rest of my jewels, &c.;" and Louisa will take all the jewels, which are not well given to some other person. It is clear, that, at the testatrix's death, there were not any jewels in such circumstances, that the preceding words can be held to apply to them. Nothing, therefore, is excepted from

† 2 P. Wms. 387.

JERNINGHAM the gift to Louisa. It is a perversion of legal principle to say, ^{c.}
HERBERT. that a general gift shall fail, because a possible exception from it happens to fail. If a testator, after some partial bequests, disposes of the residue of his property, the effect of the failure of the partial bequests, is, not to destroy the residuary disposition, but to increase the amount of the property comprised in it. There would have been little weight in the argument for the plaintiffs, even if the testatrix had referred to jewels in boxes actually deposited at the date of her will, and then disposed of by some paper writing. But the words, which make the supposed exception from the gift to Louisa, are merely prospective, and refer to a future act which the testatrix might or might not continue to intend.

The MASTER OF THE ROLLS observed, that the will contained no present gift of the jewels and other specified articles, but referred to a future act to be done by the testatrix in order to complete her gift; and that, this future act being prevented by the subsequent lunacy, the intended gift of the jewels wholly failed.

Exception allowed.

[391] In another part of the will, the testatrix gave, in manner therein mentioned, “ a sum of 5,000*l.* lent by her on the estate of G. Johnstone, Esq. on mortgage.” By the decree made at the hearing of the cause, it was referred to the Master to inquire, and state to the Court, on what estate and in what manner the sum of 5,000*l.*, in the testatrix’s will mentioned to be lent on the estate of George Johnstone, Esq. on mortgage, was secured, and in whom such sum of 5,000*l.* was then vested, and for whose use and benefit.

[The result of this inquiry is sufficiently stated in the following judgment of the MASTER OF THE ROLLS, who said:]

1829.
July 16.

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The late Mr. George Johnstone purchased of Mr. George Grant an estate in Scotland, which Mr. Grant had previously charged with an annuity of 500*l.* to his wife, in case she should survive him, or he should become bankrupt; and, upon that occasion, Mr. Johnstone was allowed to retain a sum of 10,000*l.*

part of the purchase-money, until Mrs. Grant's death, paying interest on it, until the annuity should arise. Accordingly George Johnstone executed an heritable bond, which, over and above making the sum of 10,000*l.* and the interest to accrue thereon a real burden upon the land, contained a personal obligation on him to pay to George Grant, his heirs, executors, and assigns the sum of 10,000*l.* upon the death of Mrs. Grant, and also to pay the interest of the said *sum of 10,000*l.* to George Grant during the joint lives of himself and his wife, and, in the event of George Grant dying before his wife, to pay to her during her life the annuity of 500*l.* George Grant and his wife afterwards assigned the sum of 10,000*l.*, and the interest to become due thereon, and the contingent annuity of 500*l.* to certain persons in trust for Robert Foster Grant; and, by the deed of assignment, George Grant exonerated and discharged George Johnstone from the obligation come under by the bond above recited, and from the real burden created on the lands by the disposition granted by him to Johnstone, and from the bond itself; and George Grant and his wife thereupon delivered up to the trustees an heritable bond by which he had originally charged the lands with the annuity in favour of his wife, together with her instrument of seisin, and the bond or obligation executed by Johnstone. At the same time, George Johnstone, by an heritable bond and disposition, bound himself to pay to the trustees the sum of 10,000*l.* within three months after the decease of Mrs. Grant, with interest from the day of her death until the payment of the principal sum: and, by the same instrument, he made the sum of 10,000*l.* and interest a real burden upon the lands.

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†.
HERBERT.

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The trustees afterwards duly assigned all these securities to their cestui que trust, Robert Foster Grant. He afterwards assigned them to Mrs. Ann Frances Middleton, the testatrix in the cause; and, upon that occasion, George Johnstone executed, in London, an English bond to Mrs. Middleton, for the payment to her of the interest of the 10,000*l.* during the joint lives of George Grant and his wife, or until the right of Mrs. Grant to the annuity should take place. Mrs. Middleton by her will gave this sum of 10,000*l.*, with all interest due

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thereon, upon certain trusts therein mentioned. Mrs. *Middleton died on the 3rd of November, 1823; and Mrs. Grant, on the 15th of December, 1823. A part of the 10,000*l.* was paid to Mrs. Middleton in her lifetime: and the question in the present stage of the cause is, Whether the sum, due on the bond for principal and interest, would pass by an English will, or was to be considered as an heritable security, which would not pass by will, but would descend to the heir-at-law?

The opinion of the Scotch advocates upon the case stated by the Master does not precisely reach the point which arises here. Mrs. Middleton was the assignee of Mr. Johnstone's securities to the trustees of Robert Foster Grant; and the heritable bond, which he executed, contained also a personal obligation to pay the principal sum of 10,000*l.* within three months after the death of Mrs. Grant, and to pay the interest on the 10,000*l.* from the death of Mrs. Grant; but it contained no obligation to pay the interest of the 10,000*l.* during the joint lives of Mr. and Mrs. Grant, and it was for this reason that Mr. Johnstone afterwards gave his bond to Mrs. Middleton for the payment of such interest. In the case of *The Duchess of Buccleugh v. Hoare* (4 Madd. 467), there was an English security, as well as an heritable bond; and I there held that the English security, passing by the will, would carry with it the debt, although there was also a Scotch security. In the present case there is no English security, except Mr. Johnstone's bond for securing the interest of the 10,000*l.* during the joint lives of Mr. and Mrs. Grant; and the English will, in respect of the English security, will pass this interest.

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I believe that it is the practice in Scotland always to insert a personal obligation in an heritable bond, but such personal obligation does not alter the heritable *nature of the bond; the maxim of the Scotch law being, that the heritable security, which is the *jus nobilius*, draws after it the moveable or personal security. Although, therefore, I am of opinion that the heritable bond of Mr. Johnstone gave to Mrs. Middleton a right of personal action, the bond nevertheless retained its heritable nature, and did not pass by the English will, but descended to the heir-at-law.

CROZIER v. FISHER.

(4 Russ. 398—402; S. C. 6 L. J. Ch. 118.)

The word “survivors,” in a bequest to children, held, upon the context of the will, to mean surviving so as to attain their respective ages of twenty-one.

1828.

*March 28.**Rolls Court.*

LEACH, M.R.

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THE testator, Joseph Fisher, by his will dated in January, 1822, devised freeholds, copyholds, and leaseholds, together with an annuity which he had purchased of Viscount Mathew, in trust, for the separate use of his wife Elizabeth Fisher, during her life, and after her death, for the separate use of his daughter Sarah Elizabeth Boot, during her life; and, at her death, he gave the rents of four of the tenements to her husband Thomas Boot during his life; “and,” continued the testator, “at the death of Mr. Thomas Boot, I give, devise, and bequeath unto my said son Joseph Fisher, his heirs, executors, and administrators, all the above freehold and copyhold estates that I had given to Mr. Thomas Boot, during the term of his natural life, to all the children of my said daughter Sarah Elizabeth Boot that she now has or may hereafter have by her present or any after taken husband, or the survivors of them, share and share alike, as joint tenants to them and their heirs for ever. And also I give to my said trustee all that annuity I purchased of Lord Viscount Mathew; also all that leasehold messuage or tenement, situate in Nottingham Street, in the parish of St. Mary-le-Bone; and also all *that leasehold messuage or dwelling house, situate in Bedford Street, Covent Garden, let on lease to Mr. George Carter, to have and to hold all the said several freehold and copyhold estates, with all their rights, members, and appurtenances thereunto belonging, or in anywise appertaining, to them and their heirs for ever, and all the said leasehold estates for such terms as may be unexpired, with all the said annuity, in whatever state the same may be at the time of my said daughter’s death, to my said trustee upon this special trust and confidence, to receive the rents and profits of all the said several estates for the sole use and benefit of all the said children of my said daughter; and my further will is, that my said trustee shall, from time to time, as the rents become due, pay unto such child

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or children a just proportion of such interest, as they shall arrive at their age of twenty-one years, and to place the interest of the infants' shares in the Three per cent. Consolidated Bank Annuities for their own sole use and benefit, and so on alternately, till the youngest child shall arrive at his or her age of twenty-one years, and then all the said children, or the survivors of them, to be let into full possession of all the said estates, share and share alike. I give unto my grand-daughter Elizabeth Boot, as her share of all the said children's estate, all those two annuities that I purchased of Mr. Edward Smith, secured on premises in Brompton Row, Knightsbridge, as a marriage portion: now, I give unto my son Joseph Fisher the two said annuities in trust for my said grand-daughter upon this special trust and confidence, to pay unto her all the interest of the said annuities, as they shall become due and paid, for her own sole and separate use."

The testator died in 1803. At that time, Thomas Boot and Sarah Elizabeth Boot had ten children, several of whom died under twenty-one.

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The leaseholds in Bedford Street and Nottingham Street, as well as the annuity, were part of the property which was given to Mrs. Boot for her life: and, on her death, the question arose, at what time the interests of her several children in this portion of the assets became vested.

Mr. Pepys and Mr. Girdlestone, for the plaintiffs.

Mr. Treslove, Mr. Wakefield, Mr. Tinney, and Mr. Lovat, for different defendants.

One construction contended for was, that the shares of the property did not vest, till the youngest child attained twenty-one; or if the share of an elder child did vest at any earlier period, yet that it would be divested, in the event of his dying before the youngest reached his full age. It was when the youngest child attained twenty-one, and not till then, that the property was to be distributed among the children; to that time, therefore, the term "survivors" was to be referred; and only such of the children, as should be then living, could take.

Another construction was, that the shares vested in the children as they respectively attained twenty-one, and that the phrase, “the said children or the survivors of them” was equivalent to “all the said children, or such of them as shall live to attain the age of twenty-one.” Each child, as he attained twenty-one, was to receive his share of the accumulated rents and profits: a direction which was irreconcilable with the supposition, that the interest was liable to be divested by any subsequent event.

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A third construction was, that the word “survivors” was to be referred to the death of the tenant for life, and *that all the children, who survived the tenant for life, took vested interests, even though they did not attain twenty-one years. The trustees, it was said, were directed from the death of the daughter to receive the rents and profits for the sole use of all her children, and the shares of the infants were ordered to be invested for their benefit. All the children, therefore, who were then living, took a vested interest in the rents and profits; and it could scarcely be supposed that the testator meant the shares of the rents and profits to vest at one time, and the shares of the capital to vest at another.

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The MASTER OF THE ROLLS stated, that the Court would not, unless forced by the plainest words, adopt a construction, by which the interest of a child of full age, and settled in life, would be divested, if he happened to die before the youngest child attained twenty-one; that here the word “survivor” admitted of another and more rational meaning, namely, surviving so as to attain twenty-one; that, therefore, every child attaining twenty-one acquired a vested interest in his proportion of the capital; and that the children, who died before attaining twenty-one, took, during their lives, a vested interest in that proportion of the rents and profits which corresponded to their presumptive shares, but that such interest determined on their deaths.

* * * * *

MURRAY v. ADDENBROOK.

(4 Russ. 407—422; S. C. 8 L. J. Ch. 79.)

1828.

March 31.

April 1.

Rolls Court.

LEACH, M.R.

*Lincoln's Inn
Hall.*

1828.

August.

1829.

Dec. 22.

1830.

Jan. 16.

[407]

In a will, the words "failing the male issue," were, upon the whole context, construed to mean, "if there shall be no son then living."

A testator having bequeathed a yearly sum to a person for life, gave the annuity, upon the death of the annuitant, to the eldest surviving son of A., and, failing the male issue of A., to the daughters of A. living at the demise of such male issue; at the death of the annuitant, A. had no son living, but had two daughters: Held, that the gift to the daughters of A. was not too remote, and that they were entitled to the annuity.

The same testator gave the residue to his widow during her life, and at her demise, to the eldest surviving son of A. upon his attaining twenty-five (the trustees being directed to apply the interest to his use till he attained that age), or, failing such male issue, to the daughters of A. living at the time of the demise of the last of such male issue; the only son of A. died under twenty-five, in the lifetime of the widow, leaving two daughters of A. him surviving: Held,

That, if there had been any son of A. living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five:

That the gift over of the residue to the daughters of A. was not too remote, and that, in the events which happened, they, upon the death of the widow, became entitled to the residue.

THE testator, General Murray, after giving by his will several life annuities to different persons, and, among others, to John Murray, eldest son of Sir John Murray, Bart., 60*l.* per annum, during his life, proceeded in the following words: "These several annuities, amounting to 270*l.* per annum, are to be paid half-yearly; the first half-yearly payment to be made within six months after my decease, and which 270*l.* per annum, as the several *life annuities fall in, I give and bequeath to my aforesaid trustees for the use and benefit of the eldest surviving son, lawfully begotten, of the aforesaid Sir John Murray, Bart., and, failing the male issue lawfully begotten of the said Sir John Murray, Bart., to the daughters lawfully begotten of the said Sir John Murray, living at the demise of such male issue, in equal proportions."

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The clause, by which the testator disposed of the residue of his property, was in the following words: "The remaining produce is to be enjoyed by my wife, Mary Murray, during her natural life: and then I give and bequeath the aforesaid sums,

at her demise, to the eldest surviving son, lawfully begotten, of Sir John Murray, Bart., aforesaid, upon his coming to the age of twenty-five years; the interest arising therefrom, after the demise of my said wife, Mary Murray, to be applied to the use of the said surviving eldest son, as to my trustees may seem most proper, till he comes to the age of twenty-five years as before specified; or, failing such male issue lawfully begotten, to the daughter or daughters of the aforesaid Sir John Murray, Bart., lawfully begotten, and living at the time of the demise of the last of such male issue, in equal proportions."

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Sir John Murray had one son only, John Murray, who died under twenty-five, before any of the other annuitants, and did not leave any son. There were two daughters of Sir John Murray who survived the son.

Some time afterwards, one of the annuitants died: and now the question was, whether, in the event which had happened, the annuity was undisposed of, and went to the testator's next of kin, or whether, by reason of the death of the only son of Sir John Murray before the annuitant, the annuity passed by the words of the will to Sir John Murray's two daughters.

Mr. Pemberton, for the next of kin :

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"Failing the male issue of Sir John Murray," is the event, and the only event, in which the fund is given to the daughters. The gift to them is, therefore, a disposition of personal estate, to take effect after a general failure of issue male, and, consequently, is too remote. * * *

Mr. Wakefield, *contra* :

The question is simply, Whom did the testator intend by "male issue?" The term is not one that bears a technical and inflexible signification; and there are many cases in which it has had meanings put on it, sometimes more, and sometimes less, restrictive: *Morse v. Lord Ormonde*,† *Wellington v. Wellington*.‡ The objects of the testator's bounty, in his disposition of the fund provided for the annuities, appear to have

† 25 R. R. 85; 1 Russ. 382; 5
Madd. 99, 115.

‡ 4 Burr. 2165.

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BROOK.

[*410]

been the sons and daughters of Sir John Murray; and the daughters are postponed only for the sake of the sons. There is no gift, either express or implied, to the issue of sons. When, therefore, the bequest to the daughters is made to depend on the failure of male issue, he meant sons—*the persons who would take under the preceding gift. The male issue, of which he speaks, is “male issue lawfully begotten of Sir John Murray;” a mode of expression which, in strict propriety, is applicable only to sons, and cannot be considered as descriptive of more remote descendants. The daughters, to whom the fund is given over, are to be daughters living at the demise of such issue male; so that the testator had in view, not an indefinite failure of issue male, but a failure of issue male in the lifetime of Sir John Murray’s daughters.

April 1.

THE MASTER OF THE ROLLS :

The expressed intention of the testator is, that the eldest of the sons of Sir John Murray, who should survive the annuitant, should succeed to the annuity: and if it had happened that Sir John Murray had had sons, and that the first son had died before the annuitant, leaving a son, the second son, surviving the annuitant, must have taken in exclusion of the sons of the first son. The testator, therefore, has told us, that he did not mean to limit the succession of the annuity to the issue male of Sir John Murray, but that he contemplated a personal benefit to such son of Sir John Murray as should survive the annuitant; and he could hardly mean that the succession of the daughters should depend upon the failure of issue male who were not to take before the daughters. It is true, that, as between the sons, the right was to depend upon the single fact of survivorship of the annuitant, but that the daughters were to take, although they did not survive the annuitant, if they were living at the demise of the male issue: but this difference may well have escaped the attention of the testator; or he may have intended it, as the daughters were to take equally between them. It is observable, *that the expression “living at the demise of such male issue” is more referable to the death of an individual, than to the extinction of a whole line of issue.

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Upon the whole, therefore, it does appear to me that I shall best advance the intention of this testator by construing the words “failing the male issue” as if it had been written, “if there shall be no son of Sir John Murray then living,” and by declaring, that the two daughters of Sir John Murray are entitled to the annuity.

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BROOK.

The next of kin appealed against this order ; and the question was argued before the Lord Chancellor.

1828.
Aug. 7.

Before the petition of appeal was disposed of, the widow of the testator died ; and then the question arose on the residuary clause, whether the residue, of which the widow was tenant for life, went over upon her death to the two daughters of Sir John Murray, or whether the limitation to them was too remote, so that the fund devolved to the next of kin.

The next of kin presented a petition, claiming to be entitled to the residue ; and both petitions were heard together.

Mr. Pemberton, for the next of kin [cited *Andree v. Ward*,† *Leake v. Robinson*,‡ *Jee v. Audley*,§ and *Bull v. Pritchard*.||]

1829.
Dec. 22.

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Mr. Pepys, for the personal representative of the widow.

Mr. Knight, *Mr. Wakefield*, and *Mr. Flood*, for the daughters of Sir John Murray.

[*Mr. Pemberton* in reply referred to *Lyon v. Mitchell*.¶]

[The arguments of counsel sufficiently appear from the following judgment :]

THE LORD CHANCELLOR :

1830.
Jan. 16.

[417]

There are two petitions in this case, arising out of different dispositions contained in the will of Thomas Murray : the one was an original petition, the other was a petition by way of appeal from the decision of the present MASTER OF THE ROLLS. The former relates to the disposition of the residue ; and it will be

† 25 R. R. 36 (1 Russ. 260).

|| 25 R. R. 27 (1 Russ. 213).

‡ 16 R. R. 168 (2 Mer. 363).

¶ 16 R. R. 248 (1 Madd. 467).

§ 1 R. R. 46 (1 Cox, 324).

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[*418]

convenient, in considering the construction of this will, to commence with adverting to that disposition.

Sir John Murray, who is mentioned in the will, had a son and two daughters. The son died in the lifetime of the testator's widow; the daughters survived; and now, on the death of the widow, they claim that property *which the widow took as residue for her life: and the question is, whether, upon the terms made use of by the testator, they are entitled. The intention of the testator to my apprehension is sufficiently clear. The doubt will be, whether the terms of this devise are such as will enable us to carry that intention into effect, without infringing any rule of law.

The testator begins his disposition of the residue with these words: "The remaining produce is to be enjoyed by my wife Mary Murray during her natural life." The life estate is thus given to the widow. He then says, "and then I give and bequeath the aforesaid sums at her demise to the eldest surviving son lawfully begotten of Sir John Murray, Bart. aforesaid." There is no dispute with respect to the meaning of the term "surviving;" here it must mean living at the death of the widow, that is, living when the event takes place, upon which the fund is to be distributed or given over. Then he goes on thus: "upon his coming to the age of twenty-five years." It is said this is too remote; because a son of Sir John Murray might be born after the death of the testator, and that son is not to take, until he attains the age of twenty-five years. The observation would be correct, if the will had stopped here. But the will goes on thus: "the interest arising therefrom, after the demise of my said wife Mary Murray, to be applied to the use of the said surviving eldest son, as to my trustees may seem most proper, till he comes to the age of twenty-five years as before specified." It appears to me, that, in this clause, the whole of the interest is given to the son: the whole of it is to be applied to the use of the son, though the manner, in which it is to be so applied, is left to the discretion of the trustees; and, therefore, as the whole of the interest is given immediately *upon the death of the widow, the eldest surviving son would, upon her death, have taken a vested interest in the residue. Therefore, the gift to the son is not too remote.

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BROOK.

The will proceeds thus: "Or failing such male issue lawfully begotten, to the daughter or daughters" as therein mentioned. Now this does not seem to me to be intended as a limitation to take effect after the enjoyment of another particular estate, but it is an alternative disposition. "Or failing such issue," that is, such male issue—or, in other words, in the event of there being no son surviving,—in that case, the testator gives the fund to the daughters. It appears to me, therefore, impossible to put any other interpretation upon the bequest, than that which I have stated, consistently with the obvious intention of the party, and the grammatical construction of the terms which are employed. If there is no son of Sir John Murray living at the death of the widow, the daughters are to take: but to what daughters is the property given? "To the daughter or daughters of the aforesaid Sir John Murray, Bart. lawfully begotten and living at the time of the demise of the last of such male issue in equal proportions:" that is, to the daughters who are living at the time of the death of the last son, which son must die in the lifetime of the widow, otherwise that son would be a surviving son and would have taken. Thus, the bequest is limited to the period of the lifetime of the widow.

It appears to me, therefore, that the limitation of the residue to the daughters is not too remote, and that the intention of the testator, as expressed in the terms he has used, is obviously this,—that the eldest son surviving the widow shall take, and if there be *no son surviving the widow, that the daughters, who are living at the death of the last son who died in the lifetime of the widow, shall take the property in equal shares.

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We come next to consider the construction of the clause to which the petition of appeal relates; and it is impossible to consider this part of the will, without finding that the residuary clause throws light upon the construction which ought to be put upon the preceding bequest. The first clause, I admit, is expressed in terms much more general than the residuary clause, and wants some of those particular words, which mark, to my mind, in the strongest manner, the intention of the testator; yet it seems to me impossible to construe the first clause, taking it in connection with the last clause, so as to give it a different

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ADDEN-
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meaning, or to consider that the testator intended a different disposition of this portion of his property from that which he has made of the residue. The differences between the two clauses are these. In the last clause we have "Or failing such male issue lawfully begotten:" in the first clause, "and failing the male issue lawfully begotten;" substituting "and" for "or," and leaving out the word "such." In the residuary clause the gift is to daughters "living at the demise of the last of such male issue;" and in the first clause, it is to daughters "living at the demise of such male issue." There is no difference in substance between the two bequests: the one cannot, in my mind, be construed differently from the other.

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In the clause to which I am now adverting, the testator, having before given certain annuities for life, amounting to the aggregate sum of 270*l.* a year, disposes *of those annuities as they should successively fall in; "which 270*l.* per annum," he says, "as the several life annuities fall in, I give and bequeath to my aforesaid trustees for the use and benefit of the eldest surviving son lawfully begotten of the aforesaid Sir John Murray, Bart." (the same expression which is used in the other bequest,)—that is, the eldest son of Sir John Murray, Bart., who shall be living at the time when those respective annuities fall in,—“and, failing the male issue lawfully begotten of the said Sir John Murray, Bart., to the daughters lawfully begotten of the said Sir John Murray, Bart.” In this clause, as in the other, the meaning is, that, in the event of there being no son surviving, the property is to go to the daughters. The word “failing,” as connected with “issue,” has, demonstratively, I think, that meaning in the residuary clause; and it is fair, therefore, to give the same construction to it in this clause, particularly when we consider that, even if the limitation were construed as a limitation to take effect on an indefinite failure of issue, yet the issue are not to take: it is only the surviving son who takes. Why then should the daughters have been postponed, till after an indefinite failure of a class of issue, which class of issue in the meantime were not intended to take? Besides, the gift is to the daughters living at the *demise* of such male issue. The testator contemplated, therefore, that the daughters would be living at the time when

the failure of male issue, which was present to his mind, was to take place; he contemplated that the failure, of which he spoke, would take place in the lifetime of the daughters. It is not reasonable, therefore, to suppose that he contemplated a general failure of issue.

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BROOK.

Such were the observations made by the MASTER OF THE ROLLS, when the case was before him: and they are *greatly strengthened and confirmed when we apply to the construction of this clause, what appears to me to be the clear and obvious construction of the residuary clause; the phraseology being the same, with the exception only of the interposition of one or two small words, which, in the latter, mark more precisely and definitely what the testator meant. The appeal must be dismissed: and on the original petition it must be declared that the daughters are entitled to take, on the death of the widow.

[*422]

AULT v. GOODRICH.†

(4 Russ. 430—434.)

1828.
May 5, 6.

A general dissolution of partnership between A. and B. does not operate to discharge A. from his responsibility for the subsequent conduct of B. in respect of the engagements of the partnership with third persons, made prior to the dissolution.

Rolls Court.
LEACH, M.B.
[430]

If A. and B., as partners, engage in a speculation with C., A. is answerable to C. in respect of the dealings of B. in the joint speculation.

A PARTNERSHIP, consisting of Wilcox the elder and Wilcox the younger, had been interested in a joint speculation in timber to the extent of one third part; and, the partnership having been dissolved, and Wilcox the elder having died before the joint speculation was wound up, the following questions arose:

First, whether the partnership of the Wilcoxes, and consequently the estate of Wilcox the elder, was to be answerable for all sales and receipts by Wilcox the younger, in respect of the speculations in timber, which took place during the continuance of his partnership with Wilcox the elder: secondly, whether the

† See now The Partnership Act, 1890, s. 38; and for some critical remarks on this case see Lindley on Partnership, 6th ed., 228.

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estate of Wilcox the elder was to be answerable in respect of the dealings of Wilcox the younger in the joint speculation, after the dissolution of his partnership with Wilcox the elder : thirdly, how far, under the circumstances of the case, the estate either of Wilcox the younger or of Wilcox the elder was protected from responsibility by the Statute of Limitations.

The facts, on which these questions arose, are fully stated in the judgment pronounced at the hearing of the cause.

Mr. Pepys and Mr. Pigott, for the plaintiff.

Mr. Horne, Mr. Rolfe, and Mr. Barber, for the different defendants.

[431] THE MASTER OF THE ROLLS :

In 1812, the plaintiff, the defendant Palmer, and two persons of the name of Stephen Wilcox the elder and Stephen Wilcox the younger, entered into a contract for the purchase of certain timber trees then standing in a wood called Newhurst, for which they were to pay a sum of 9,500*l.* The two Wilcoxes were then in partnership together as timber merchants, and they were to be interested, as partners, in one third of the speculation ; the plaintiff was to be interested in another one third ; and the defendant Palmer, in the remaining one third. The whole of the purchase-money, except about 1,000*l.*, was paid by the Wilcoxes, and the remaining 1,000*l.* was paid by the plaintiff and the defendant Palmer, as appears by the account hereinafter referred to. Each of the three parties concerned took to themselves certain trees, which, by the same account, seem to have been of the value of 400*l.* The sales of the remainder of the trees were principally conducted by Stephen Wilcox the younger. The two Wilcoxes dissolved their partnership in the month of April, 1814. Stephen Wilcox the elder died in 1815, and Stephen Wilcox the younger died in 1818.

The present bill was filed in 1822 against the defendant Palmer, and against the real and personal representatives of the two Wilcoxes, for a general account of the dealings and transactions with respect to this joint speculation. The real and

personal representatives of the Wilcoxes have insisted upon the Statute of Limitations. It appears on the evidence of a Mr. Higgett, that he was solicitor for the executors of Stephen Wilcox the younger; and that, in that character, he was employed, in the year 1819, to make out from the books of account, letters, papers, and memoranda then in the *possession of those executors, the accounts of the joint speculation; and that he accordingly made out an account, which is proved in the cause, by which it appeared that a balance of 562*l.* was then due to the plaintiff, and a balance of 117*l.* 10*s.* was then due to the defendant Palmer. He says that this account was made out in consequence of the urgent applications of the plaintiff and the defendant Palmer, and that he carried it to the defendant Palmer, and left it with him for the purpose of being compared with his books, but that he did not deliver it to Palmer as an admitted account; for that, being collected from the different books and papers, and not from any regular and complete account, it was not, in his opinion, entirely to be depended upon.

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v.
GOODRICH.

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There is other evidence to prove that the accounts of the joint speculation were open and unsettled at the death of Stephen Wilcox the younger, to which it does not appear to me to be necessary to refer more particularly; because, after the making out and delivering of this account by the executors of Stephen Wilcox the younger within six years before the filing of the bill, the Statute of Limitations is wholly out of the question, as far as regards the estate of Stephen Wilcox the younger.

It is said, however, that the estate of Stephen Wilcox the younger is considered to be insolvent, and that the real object of this suit is to reach the estate of Wilcox the elder; and the plaintiff insists that the estate of Wilcox the elder is answerable to the joint concern in respect of all the dealings and transactions of Wilcox the younger, which took place during the life of Wilcox the elder, notwithstanding the dissolution of the partnership between the Wilcoxes in 1814. *Primâ facie* it must be intended, that, the partnership being interested in one *third of this joint speculation, all sales and all receipts of money by Wilcox the younger, during the continuance of the partnership, were partnership transactions; and it appears by the evidence of William

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" .
GOODRICH.

Lowndes, in answer to the third interrogatory, that he was engaged by Wilcox the elder to superintend the management and disposal of the timber which was the subject of this speculation, on behalf of all parties interested in the purchase; and, in answer to the tenth interrogatory, Lowndes produces certain books of account, which he describes as containing the accounts of the two Wilcoxes, and as having been kept by them during the continuance of the partnership, and subsequently, by Wilcox the younger to the time of his death. These books, he says, contain accounts of the sales of the timber so purchased upon joint speculation; but whether they contain all the accounts of such sales he does not know. I have already observed, that, in the absence of all evidence upon the subject, it must have been intended that the sales by Wilcox the younger were sales on the partnership account; but here is direct evidence to that effect. The estate of Wilcox the elder, therefore, is plainly responsible for the dealings and transactions of Wilcox the younger during the continuance of their partnership, unless protected by the Statute of Limitations.

[*434]

But the plaintiff contends that the estate of Wilcox the elder is equally responsible for all such dealings and transactions, which took place after the dissolution of the partnership between the Wilcoxes, and during the life of Wilcox the elder. The general dissolution of partnership between the Wilcoxes did not necessarily put an end to their partnership in respect of past transactions; and, there being no evidence of any new stipulation or agreement between any of the parties engaged in the joint speculation in consequence of the *general dissolution of the partnership between the Wilcoxes, I am bound to conclude that the other parties interested continued to rely upon the joint responsibility of the two Wilcoxes in respect of the dealings of Wilcox the younger, until that responsibility determined by the death of Wilcox the elder.

With respect to the Statute of Limitations, as applied to the estate of Wilcox the elder, there having been no dealings within six years before the filing of the bill, and no admission on the part of his representatives which can take the case out of the statute, the protection of his estate would have been complete.

But, Wilcox the elder having devised his estate upon trust to pay his debts, it follows, according to the doctrine now settled, that the Statute of Limitations cannot be pleaded in bar of demands which had legal existence at the time of his death; and the partnership accounts must therefore be taken.

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It must be declared that the estate of Wilcox the elder is responsible to the plaintiff and the defendant Palmer, to the extent of any balance which was respectively due to them at the death of Wilcox the elder.

ANONYMOUS.†

(4 Russ. 473.)

1828.
May 21.

The husband's costs of the proceedings in making a settlement of the fortune of a ward, whom he had married without the leave of the Court, were allowed to him out of the fund, he having no property of his own, and there being no circumstances of aggravation in his conduct.

Rolls Court.
LEACH, M.R.
[473]

On a petition to confirm the Master's report, approving of a settlement on a female ward, who had married without the sanction of the Court, *Mr. Lovat* asked, that the costs of the husband might be paid out of the fund, as well as those of the other parties. The husband had no property, but there were not any circumstances of aggravated misconduct on his part; and it was stated, that he had married the lady without being aware that she was a ward of the Court.

Mr. Whitmarsh, for the trustees, *contra*.

The MASTER OF THE ROLLS was at first not inclined to allow the husband his costs; but, a case having been mentioned in which Lord ELDON had made a similar order, he at length directed that the husband's costs should be paid out of the fund.

† *De Stacpoole v. De Stacpoole* (1887) 37 Ch. D. 139; 57 L. J. Ch. 463.

1828.

Jan. 25. 26.

Lord
LYNDHURST,
L.C.

[478]

MESSENGER v. ANDREWS.†

(4 Russ. 478—483.)

A testator gives a specific bequest to A., and directs, that, in consideration of the bequest, A. shall pay his debts, and makes A. his residuary legatee, and executor: the payment of the debts is a condition annexed to the specific bequest, and, if A. accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him.

THE testator, by his will, gave his son Richard Messenger a legacy of 100*l.*, and devised to him a real estate at Croydon: to his daughter he gave a freehold-house, all the furniture, plate, linen, &c., in a public-house, called "The Gun," which he occupied, and a legacy of 700*l.* with interest from the day of his death; and he gave to his son James Messenger, a farm at Woodside, with the stock and utensils upon it, subject to certain contingent interests in remainder, limited to the wife and children of James. The will then proceeded in the following words: "I also will and bequeath unto my son James Messenger, my lease and goodwill of the public-house called 'The Gun,' in Church Street, Croydon, with all the stock of beer, and wine and spirituous liquors on the said premises at the time of my decease, and my will is, that, in consideration of the above bequest to my son, James Messenger, he shall pay to my daughter Marian, her legacy or sum of 700*l.*, and all my debts which I may owe at the time of my decease, and that he also pay unto my son Richard Messenger, the legacy I have bequeathed to him of 100*l.*, and, after collecting all my debts which are due to me of every kind whatsoever, and paying the legacies above-named, and the sum of 60*l.* to William Waters, in such proportions as he shall think fit, at, or before he arrives at twenty-one years of age, I constitute and appoint him my son, James Messenger, residuary legatee of all my personal property whatsoever, and I do hereby also appoint him, my said son James Messenger, my whole and sole executor."

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The testator died in December, 1818: he was a trader at the time of his death.

† *Rees v. Engelback* (1871) L. R. 12 Eq. 225; 40 L. J. Ch. 382.

James Messenger proved the will; collected the testator's personal estate; entered into possession of "The Gun" public-house, and the stock of wine, beer, and spirituous liquors; and carried on the business in it. Some time afterwards he surrendered the existing lease, of which about ten years were unexpired, and obtained a new lease, under which he still occupied the premises and carried on the trade.

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v.
ANDREWS.

In 1823, James Messenger filed a bill, alleging that the debts of the testator considerably exceeded the value of all the personal assets; that he had applied in payment of the debts, not only all the personal estate of which he had possessed himself, but monies of his own, far exceeding the value of the lease and goodwill of "The Gun" public-house, and what he was bound to contribute in respect of the freehold estate devised to him; and that he had entered upon and retained the public-house, not by virtue of the bequest, but in part satisfaction of the monies so advanced by him. The prayer was, that the sum, by which the personal estate was insufficient for the payment of the testator's debts, might be raised rateably out of the different freeholds devised by his will.

The defendants, by their answers, insisted, that the bequest of "The Gun" public-house and the stock in it, was subject to the condition that James Messenger was to satisfy the debts and legacies; that he had accepted the bequest: and that he had thereby taken upon himself the payment of the testator's debts and legacies.

On the 30th of June, 1825, the cause was heard before the Vice-Chancellor; when his Honor declared that the *plaintiff, accepting the bequest of the lease and goodwill of the public-house called "The Gun," in Church Street, Croydon, with the stock of beer, wines, and spirituous liquors, on the premises at the time of the testator's death, was bound to pay the debts which the testator owed at his death; and it was ordered that it should be referred to the Master in rotation, to inquire and state to the Court, whether the plaintiff did accept the bequest; and the Master was to be at liberty to state special circumstances.

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The plaintiff appealed.

The principal question was, whether the words of the will

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merely created a trust, charging the debts of the testator on the specific bequest to James Messenger, and making it incumbent on him to satisfy the debts, so far as the specific bequest would extend ; or, whether they imposed a condition which rendered it obligatory on the legatee, if he accepted the bequest, to satisfy the debts, however much they might exceed in value the worth of the subject of the gift.

The Attorney-General (Sir Charles Wetherell) and Mr. Jacob,
 for the appellant :

When the testator gives the public-house and his stock in trade to his son James, and directs, that, in consideration of the bequest, he is to pay the testator's debts, his meaning must have been to confer a benefit, and not merely to impose a burthen upon the legatee. But, if the legatee is to be answerable for the debts, beyond the amount of the value of the gift, ruin may be entailed upon him under the semblance of bounty. It is unreasonable to impute to the testator an intention that James should pay the debts with his own money ; the sole purpose was to make the debts a primary charge on the personal property specifically bequeathed to him.

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In fact, the debts of the testator amounted to about 2,500*l.*, and the whole of the personal property did not exceed 500*l.* in value ; it is absurd to suppose that any man would, in consideration of a part of 500*l.*, make himself liable for 2,500*l.*, or that any father would wish to place a son in such a situation.

Even if the words be supposed to create a condition, the condition is senseless and void, or, at least, inoperative ; for he, on whom the condition is imposed, is the person who is to have the benefit of the breach of it : *Smith v. Alterly*.† In an *Anonymous* case,‡ land was devised to the heir-at-law, paying a sum of money to B. : and it was held, “ that paying did not make a condition, because no one could enter for the condition broken, but the devisee himself ; but this would be a trust upon the land for raising the money.” If James Messenger did not comply with the condition, the specific bequest would fall into

† Freem. 136.

‡ Freem. 278.

the residue; and being residuary legatee and executor, he would be entitled, in that character, to deal with the public-house and stock as his own, subject only to the burden of debts. Of course, therefore, he would take the property in the more advantageous character of executor and residuary legatee, instead of exposing himself to the indefinite liability annexed to the specific bequest.

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†.
ANDREWS.

Mr. Sugden and Mr. Ching, for the defendants :

The principle of the decision of the VICE-CHANCELLOR was, that the lease of the public-house, including the goodwill and the stock in trade, was given to James, in consideration of his paying the debts of the testator, and that, if James accepted the bequest, he became bound to pay the debts. The question is simply a case of construction; *and has no connection with the technical doctrine of conditions as annexed to interests in land. James had, during four years, assisted the testator in his business; he knew what his debts were; he knew the value of the trade: and having taken the business, and renewed the lease in his own name, he must be considered as having undertaken the concomitant liability. If he did not mean to enter into possession as legatee, but merely as executor, he ought at the time to have manifested that purpose by a suitable protest.

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Another question raised in the argument was, whether the trust or condition extended to the Woodside Farm devised to James Messenger, or was confined to the bequest of the public-house and stock of liquors.

THE LORD CHANCELLOR :†

The points raised in this cause depend entirely upon the terms of the will. The first question is, whether the qualification, annexed to the bequest to James Messenger, is a trust or condition; and, the second, whether it attaches upon the devise of the Woodside Farm as well as "The Gun" public-house, or upon the latter only. Now I am of opinion that the words "and my will is, that, in consideration of the above bequest to my son

† The judgment is given *ex relatione*.

MESSENGER James Messenger, he shall pay, &c. all my just debts, &c." annex
v. a condition to the bequest, but that the condition is annexed to
ANDREWS. the bequest of the public-house and stock in trade only, and not
to the devise of the farm at Woodside. The testator's intention
was, to give to his son, who had long been employed in his
trade, the option of taking the business, provided he paid the
[*483] *debts. The testator does not provide for the payment of his
debts thereout, but he makes the payment of his debts the price
at which his son was to purchase the public-house and goodwill :
and I see nothing unreasonable in such a bequest.

Another question made in this cause was, whether the legatee has accepted the bequest, so as to be bound by the condition. If I were called upon to decide that question now, I confess I should hold that he has by his acts accepted this bequest and is bound by the condition. As he had resided many years with his father, and had managed this business for him, he must have had the best opportunity of knowing both the value of the premises and business, and the amount of his father's debts : still he would be entitled to a reasonable time and opportunity to judge of the value of the property and the burden of the condition. But how does he deal with this property ? Immediately after his father's death he takes possession of it, carries on the trade for four years and upwards, sells and consumes the stock, and renews the lease as his own and in his own name. Under such circumstances, if I were now called upon to decide the point, it would be difficult to say that he had not accepted the bequest. If, however, it should turn out upon inquiry, as it has been alleged in argument, that the debts were five times more in amount than the value of the property, that would be a circumstance to be taken into consideration as evidence that it was not the legatee's intention to accept the legacy burdened by so onerous a condition ; and the Master will allow due weight to it, as a circumstance of evidence, in the inquiry before him. But at present I can only affirm the VICE-CHANCELLOR's judgment, so as to give both parties an opportunity of bringing all the facts of the case before the Court.

FOXCRAFT *v.* WOOD.

(4 Russ. 487, 488.)

1828.
Feb. 12.Lord
LYNDHURST,
L.C.

[487]

A business, which was the property of Fennell, was carried on in the name of Foxcraft, who was the agent of Fennell at a fixed salary; Foxcraft being under considerable liabilities in respect of that business, Fennell became bankrupt; Foxcraft was held to have a lien on the property of the concern to the extent of his liabilities; and the assignees of Fennell were restrained from interfering with the business or the property belonging to it, and from receiving monies due to it.†

FENNELL had purchased a business in Birmingham, which was carried on for his profit, and with his capital, in the name of Foxcraft, who was merely his agent at a fixed salary. Fennell having become bankrupt, Foxcraft filed his bill, stating that, by reason of the use of his name for the purposes of the trade, he was under heavy liabilities for the concern, which was solvent, notwithstanding the bankruptcy of Fennell, and praying that the assignees and messenger under the commission might be respectively restrained from taking possession of or selling the business or concern, or the premises where it was carried on, or the stock in trade and effects thereof, and from collecting or receiving any monies due or owing to the concern, or in any wise intermeddling or interfering therewith.

The VICE-CHANCELLOR had granted the injunction.

The defendants now moved before the Lord Chancellor to dissolve the injunction.

Mr. Pepys and *Mr. Coombe*, for the motion.

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Mr. Bickersteth, *contra*.

In support of the motion it was argued that there was no precedent for restraining the assignees under a commission of bankrupt from taking possession of property which unquestionably belonged to the bankrupt. The whole of the business carried on in the name of Foxcraft, was Fennell's: the assignees were entitled to the possession of it; and the claim of Foxcraft would be the subject of account between him and the estate of the bankrupt.

† In the original head-note letters are substituted for the names, and misplaced (as frequently happens when this is done) so as to spoil the whole sense.—F. P.

FOXCRRAFT
v.
WOOD.

On the other hand, it was said that the VICE-CHANCELLOR had granted the injunction on the principle that the property ought not to be taken out of the hands of the agent, till he was indemnified against his liabilities. In *Drinkwater v. Goodwin*† it was held that a factor, who became surety for his principal, had a lien on the price of the goods sold by him as such factor to the amount of the sum for which he was surety. Here Foxcraft, as between him and Fennell, was surety for the latter, so far as regarded the debts of this particular business; he had therefore a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liabilities which he had incurred on account of it; and he had a right to have the proceeds of the property applied in the discharge of those liabilities.

The LORD CHANCELLOR was of opinion that the injunction had been granted properly, and

Refused the motion with costs.

CAPEL v. WOOD.

(4 Russ. 500—506; S. C. 3 L. J. Ch. 91.)

1825.
Feb. 21.
—
GIFFORD,
M.R.
On Appeal.
1828.
Feb. 25.
—
Lord
LYNDHURST,
L.C.
[500]

A testator devised premises, which he held by lease under the Dean and Chapter of Westminster, to A. for life, subject to the payment of all fines and rents as they became due yearly; and he directed that, after A.'s decease, the premises should be vested in two trustees, who were to manage the same to the best advantage, and were to pay all rents and fines until B., to whom the testator bequeathed all the remaining term and interest which he had in the lease, should attain his age of twenty-one years: the lease was holden at a nominal rent, and contained no covenant to renew; but the custom of the Dean and Chapter was, to renew every seven years on receiving a reasonable fine; and, at the death of the testator, about thirty years of the term were unexpired: Held, that A. was not bound to renew the lease at any time during her life.

THE will of Henry Capel, dated the 9th of May, 1802, contained the following bequest:—

“I give and bequeath unto Mary Wood, during her own natural life, all these two leasehold messuages and premises

† Cowp. 251.

CAPEL
WOOD.

situate in Northumberland Street, which I hold under the Duke of Northumberland, to hold to her the said Mary Wood during her natural life, all my estate, remainder of the term, and all my interest therein, subject nevertheless to the payment of the several rents, and the performance of all and singular the covenants, clauses, and agreements which, on the lessee's part and behalf, are to be paid, done, and performed. Item, I further give and bequeath to the aforesaid Mary Wood, likewise during her own natural life, all that messuage and premises situate in the Strand, which I hold under the Dean and Chapter of Westminster, to hold, during her own natural life only, all my estate, right, title, and interest therein, subject nevertheless to the payment of *all fines and rents as they become due yearly and for every year, and likewise to the due performance of all and singular the covenants, clauses, and agreements which, on the lessee's part and behalf, are to be paid, done, and performed. And I further will and direct, that as soon and immediately on the decease of her the said Mary Wood, all the aforesaid leasehold estates shall be vested in and unto John Girdler and William Tothill," (who were two of his executors,) "their executors and administrators, in trust that they manage and do the best for the interests and improvements thereof as their judgment shall direct; that they receive all rents due or to become due thereon, out of which, nevertheless, they shall, during the time of their said trust, have care to pay all fines, rents due, and other demands, and be subject to all the covenants, clauses, and agreements, which, on the lessee's part, are to be paid, done, and performed. And it is my will the said trust do commence immediately on the decease of the said Mary Wood, and to be continued until my great nephew William Capel shall attain and complete his full age of twenty-one years, when the said trust shall cease, and then be conveyed or assigned over to him the aforesaid William Capel, to whom and his heirs lawfully begotten, I do hereby will and bequeath the same, to have and to hold all the remaining term, right, title, and interest which I now have in all the aforesaid leases in Northumberland Street and the Strand, with all accumulation (if any) thereon."

[*501]

The testator died on the 12th of July, 1802. The lease

CAPEL
r.
WOOD.

[*502]

of the house held under the Dean and Chapter of Westminster was for forty years from Michaelmas, 1792, at a yearly rent of 12s. The lease contained a covenant, "that it should not be lawful for the executors, administrators, or assigns of the lessee, after his decease, *cessation, grant, or dismissal, to enter into the premises, or occupy the residue of the term, without a new grant thereof from the Dean and Chapter, or their successors, according to the custom used, and upon payment of the customary fees." There was no covenant for renewal.

Mary Wood having continued to enjoy this leasehold without having renewed the term, Capel Wood, who had now attained his full age, in August, 1822, filed his bill against her, alleging, that, though it was not usual for the Dean and Chapter of Westminster to covenant for renewal in the leases granted by them, yet it was customary for them, upon the application of the parties beneficially entitled, to renew the leases every seven years upon payment of fines calculated according to the portion of the term which had expired. The prayer was, that she might be decreed to procure from the Dean and Chapter a renewal of the lease, so as to make the unexpired term thereof as beneficial to the plaintiff, as if she had renewed it at the customary intervals, and that she might pay the fine which should be necessary for that purpose.

Mary Wood died, and the suit was revived against her personal representatives.

[*503]

George G. Vincent, the chapter-clerk of the Dean and Chapter of Westminster, proved, that, with respect to houses demised for forty years, the custom of the Dean and Chapter is, at the end of the first fourteen years, or any subsequent time, to grant renewals, so as to make up the term of forty years; that these renewals are generally made upon the terms expressed in the original lease, and in consideration of fines, which, though their amount depends entirely on the pleasure of the lessors, *are moderate and reasonable; and that the Dean and Chapter never refuse to renew, when the terms they require are complied with.

1825.
Feb. 21.

Mr. Heald and Mr. Whitmarsh, for the plaintiff :

The principle, on which cases of this kind are to be determined,

is alluded to by the LORD CHANCELLOR in *White v. White*.† “A person entitled for his own life is not bound to renew, except from the terms of the will or the nature and formation of the gift to him, you can imply an intention, that he should be obliged to renew:” *Montford v. Cadogan*.‡ Here both the grounds are found, either of which would be sufficient to create an obligation to renew. First, it never could have been the intention of the testator to permit the lease to expire. The custom of renewal was a privilege, which he could not mean to lose; and if there was no renewal, the probability was, that the remainder-man would take little or no benefit. The object of the testator was, to give to his legatees the utmost extent of interest that could be had under the Dean and Chapter. Therefore, the nature and formation of the gift shew an intention that the lease should be renewed.

CAPEL
WOOD.

Secondly, the words of the will manifest the same intention. The tenant for life is to hold the premises, subject to the payment of all fines and rents. The only payment, to which the lease was subject, was the yearly sum of 12s.; and there is nothing to answer to the word “fines,” except the fines payable upon renewal. The word does not occur in the clause which relates to the lease holden under the Duke of Northumberland: why should it have been introduced in reference to this lease? The testator expressly directs, that, after the *death of the tenant for life, all his leaseholds shall vest in his trustees, and shall be assigned to the plaintiff when he attains twenty-one. This implies that, so far as the acts of persons taking benefits under, or acting in, the trusts of his will can preserve them, the leases shall not be permitted to expire: and they can be prevented from expiring, only by being renewed in the usual manner. As the trustees were to execute these trusts during the infancy of the plaintiff, the obligation on them to renew is expressed in more precise terms than that which attaches upon the tenant for life; but there would be little consistency in supposing that the testator meant that the trustees for the remainder-man should, but that the preceding taker should not, be bound to renew the lease.

[*504]

† 4 R. R. at p. 179 (9 Ves. 561).

‡ 13 R. R. 270 (19 Ves. 635).

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v.
WOOD.

Mr. Shadwell and Mr. Merivale, for one defendant.

Mr. Sugden and Mr. Bethell, for another defendant :

The cases cited have no application ; for in them a clear trust for renewal was raised, and the question was merely as to the mode in which the trust ought to be executed. Here it is denied, that there are any words in the will, which can raise a trust for renewal. It would be a violent straining of language to found such a construction upon the occurrence of the word “ fines,” which was probably inserted to include any money payments, other than the yearly rent, which might become due—the fees, for instance, which were to be paid upon the transmission of the term, by the death or assignment of the lessee, to those who derived an interest from him. In no sense could the tenant for life be said to hold the lease subject to fines for renewal ; for there was no obligation on him to renew, and he had no right to demand a renewal. Any renewal would have been a purchase, on such terms as might be mutually agreed *upon, of a further interest from the ecclesiastical corporation. The custom of renewing, which is alleged in the bill, is altogether different from that which the evidence proves to have existed. It may be true, that, if the trust, during the infancy of the plaintiff, had taken effect, the trustees would have been bound to renew ; but what inference can be drawn from the circumstance of the testator’s having expressed with tolerable clearness his intention that certain persons, while their interest lasted, should be bound to renew, except that, where no such intention is expressed, no such intention existed ?

[*505]

LORD GIFFORD, M. R. :

There is nothing in this lease which renders it compulsory either on the lessee to take, or on the lessor to grant, a renewed term. But it is said that there is a habit of renewing on such terms as the Dean and Chapter think fit to impose ; that they are accustomed to renew on the payment of certain fines ; and that this lease is given to the tenant for life subject to the payment of all fines and rents, among which must be included the fines usually paid on renewals. Thus, the question in substance is,

whether, under the word “fines,” there is to be imposed on the tenant for life a condition of renewing according to this habit. If she were bound so to renew, she ought to have renewed within four years after the decease of the testator; and she might have been called upon to pay, in the shape of fines, sums greater than the benefit which she derived from the estate. More than an inference should appear on the face of the will to induce the Court to impose such an obligation on the tenant for life.

CAPEL
WOOD.

In a subsequent part of his will, the testator directs, “that his trustees manage and do the best for the interests *and improvements of his leasehold estates; that they receive all rents due or to become due thereon, out of which they shall, during the time of their trust, have care to pay all fines, rents, dues, and demands.” This trust is to continue, till William Capel shall have attained twenty-one; at which time the trustees are to assign to him all the testator’s remaining term and interest in the leaseholds. It may be, that, under this clause, the trustees would be bound to renew, though it is not perfectly clear that they would be under such an obligation. But the question is, does the word “fine” impose a condition on the tenant for life under the alleged usage or custom? My opinion is, that it does not.

[*506]

The bill was dismissed with costs.

From this decree the plaintiff appealed.

The argument was to the same effect as at the original hearing.

1828.
Feb. 25.

The LORD CHANCELLOR concurred in opinion with the late MASTER OF THE ROLLS, and

Dismissed the appeal.

PRATT v. BARKER.

(4 Russ. 507; S. C. 6 L. J. Ch. 186.)

1828.
March 1.

For a report of this case, taken from 1 Simons 1, see 27 R. R. 136; a note of this appeal will be found at the end of that report.

Lord
LYNDHURST,
L. C.
[507]

1828.
March 22, 24.

1829.
July 6.
1830.
Dec. 14.

Lord
LYNDHURST,
L.C.

[514]

JACKSON v. ROWE.

(4 Russ. 514—525 ; S. C. 9 L. J. Ch. 32.)

A plea of purchase for valuable consideration without notice, must aver, that the vendor pretended to be seised, not merely before, but at the respective times of the execution of the conveyance, and of the payment of the consideration.

[THE case turned upon a short point stated in the judgment which renders it unnecessary to retain any statement of the facts or arguments of counsel.]

March 24.

[523]

THE LORD CHANCELLOR :

It is stated in the authorities, that the party relying upon a plea of purchase for valuable consideration without notice must aver that the vendor was seised, or pretended to be seised, and was in possession, at the time when he executed the conveyance. In this plea I find no such averments, nor any thing equivalent to them. The averment is, “that Deborah Pope [the vendor, a widow], *before* (not *before* and *at*) the respective times of the execution of the indenture, and of her marriage with Rowe [the purchaser by marriage with the vendor], alleged that she was seised.” In the case from Atkyns† it is stated expressly that the averment must be, that the person who conveyed was seised, or pretended to be seised, at the time when he executed the deeds.

It was argued that it was not necessary that the usual form of averment should be followed in this case, because the plaintiff and defendant claimed under the same person, the vendor.‡ But no authority was cited in favour of such a distinction ; and on principle it cannot be maintained. A plea of this kind must shew, that, if the vendor had not a good title, the party purchasing was imposed on at the time of the purchase.

On this single ground, and without entering into the consideration of the question decided by the VICE-CHANCELLOR, I am of opinion that the plea must be overruled.

† 2 Atk. 630.

‡ The plaintiff claimed under an appointment in her favour made by her mother (the vendor) under a settlement made on the vendor's

former marriage ; the defendant claimed under the settlement made on the vendor's second marriage.—O. A. S.

[*Note*.—The plea was subsequently amended by the insertion of the words “and at” upon an affidavit being made by the defendant that the omission of those words was a mere slip, and the plea, as thus amended, came on for hearing before the Lord Chancellor on the 14th day of December, 1830, as reported in 9 L. J. Ch. at pp. 35, 36, and was allowed by him.—O. A. S.]

JACKSON
v.
ROWE.

STEAD v. CLAY.

(4 Russ. 550—557; S. C. 6 L. J. Ch. 138; 1 Sim. 294.)

French stock, the property of the bankrupt, was transferred by him to his wife, who afterwards transferred it to her three sisters; the wife, who had a general power of appointment over monies standing in the names of trustees in the English funds, made a will, by which she exercised that power, and died in her husband's lifetime; one of the three sisters, who was also an appointee and residuary legatee, and usually resided in France, took out administration to her, with the will annexed. An injunction was granted, at the suit of the assignee of the bankrupt, to restrain the trustees from transferring any of the stocks in the English funds over which the deceased wife's power of appointment extended.

1827.
July.
1828.
March 31.
—
Lord
LYNDHURST,
L.C.
[550]

THE bill was filed by Stead, as sole assignee under a commission of bankrupt, which, on the 26th of June, 1823, was issued against William Liddard. According to the case stated by the plaintiff, Liddard, in July, 1822, being in insolvent circumstances, and having committed an act of bankruptcy, sold his property in England, and remitted the proceeds to Paris, where the money was invested in the purchase of 2,145 francs of French Rentes, either in his own name or in the joint names of himself and his wife. The dividends of this stock were paid to Liddard's bankers to the credit of his account. Out of these dividends a further sum was in like manner invested in the purchase of an additional rente of 155 francs; and, in February, 1824, he caused the whole of this stock to be transferred into his wife's name, and she afterwards transferred it to her three sisters, of whom Susannah Clay was one.

Mrs. Liddard, who, in the event of there being no children of the marriage, had a power of appointing by deed or will 1,500*l*.

STEAD
v.
CLAY.

[*551]

3 per cent. Consolidated Bank Annuities, 59*l.* Long Annuities, and 1,000*l.* 3 per cent. Reduced Bank Annuities, all standing in the name of trustees, made a will and codicil, by which she disposed of these funds, and gave the residue of her estate and effects to her sister Mrs. Clay, and appointed executors. In January, 1825, she died without having had any children ; and, the executors having declined to *prove, Mrs. Clay, who, along with her other two sisters, had obtained possession of the French stock, took out letters of administration with the will annexed. Shortly afterwards William Liddard died.

The prayer was, that an account might be taken of the monies or effects, the property of the bankrupt, invested by him in the name of his wife, or possessed by her at the time of her death, or by Mrs. Clay ; that the plaintiff might be paid or might retain the amount out of Mrs. Liddard's assets ; that the usual accounts of those assets might be taken ; and that the trustees of the three sums in the English funds might be restrained from paying or transferring the stock or the dividends.

The 1,500*l.* 3 per cent. stock was a sum which the father of Mrs. Liddard, by a deed dated the 25th of January, 1821, settled upon trust for her separate use during her life ; remainder to her husband during his life ; and after the decease of both of them, upon trust for such persons as she should by deed or will appoint ; and in default of appointment, for her executors or administrators as part of her personal estate.

[*552]

From the answers it appeared, that the power of Susannah Liddard over the 59*l.* Long Annuities, and the 1,000*l.* 3 per cent. reduced stock, arose under an indenture dated the 12th of August, 1818, being the settlement made on her marriage with Liddard, whereby it was witnessed, that the trustees were to stand possessed of this sum of stock, in trust, after the marriage, for the separate use of Susannah Liddard during her life ; and after her decease, for the children of the marriage ; but if there should be no such child or children, then for such persons as she should by deed or will appoint ; and in default of appointment, for such persons as should be her next of kin, and would *have been entitled to her property, by virtue of the Statute of

Distributions, if she had died intestate and unmarried. This settlement comprised, also, a quantity of plate, which belonged to Mrs. Liddard; and it contained a covenant on the part of the husband, that he would convey and assure any property, real or personal, which might afterwards come to or be vested in his wife, or in him in her right, upon trust for the separate use of the wife, and to be subject to such disposition as she by deed or will should make.

About 1821, Mrs. Liddard's father died; when she became entitled to one fourth of his residuary estate, and shortly afterwards, her share, amounting to 1,338*l.* 5*s.* 9*d.*, was received by her and her husband.

Susannah Clay by her answer suggested, but without positively affirming, that the French Rentes had been partly purchased with this money, which, she insisted, was bound by the trusts of marriage settlement; and she submitted, that the rentes, so far as they had been purchased with it, were in like manner bound by the same trusts. She admitted that Sarah Liddard had shortly before her death transferred to her, Susannah, and to her two sisters, 2,300 francs of French Rentes, which were still standing in their names; but she could give no account of the mode in which Mrs. Liddard had become possessed of the stock. She denied all knowledge and belief as to any of the circumstances which were stated in the bill with a view to shew that the stock had belonged originally to the bankrupt: and she insisted that the commission was invalid; stating, that no creditor had proved under it, and that, Liddard having petitioned that it might be superseded, Lord ELDON had directed a special case for the opinion of a court of law, which the death of Liddard *had prevented from being argued.† She admitted that she and her sisters resided usually in France; and she assigned Mrs. Liddard's anxiety to be near the rest of her family as the only reason which induced Mr. Liddard, in 1822, to take up his abode in that country.

The plaintiff moved before the Vice-Chancellor for an injunction to restrain the transfer of the 59*l.* Long Annuities, and the 1,000*l.* and 1,500*l.* 3 per cent. stock.

† *Ex parte Stead, in the Matter of Liddard*, 1 Gl. & J. 301.

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CLAY.

His Honor granted the injunction as to the 1,500*l.*, and refused it as to the other two sums.†

The plaintiff now moved before the Lord Chancellor, that the injunction might be extended to the 59*l.* Long Annuities and to the 1,000*l.* 8 per cent. stock: and the defendants on the other hand, moved, that the injunction granted by the VICE-CHANCELLOR might be dissolved.

Mr. Sugden, Mr. Rose, and Mr. Knight, for the plaintiff:

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The bill alleges, and the defendants do not venture to deny, that the French stock, which was transferred into Mrs. Liddard's name, was the property of the bankrupt. The plaintiff, therefore, has a right to recover possession of the stock from the personal representatives of Sarah Liddard; in other words, he has a demand against Sarah Liddard, for which her assets will be responsible: and, consequently, he has a right to the interposition of this Court, in order to prevent her assets from being removed out of the jurisdiction. These three *sums are, for this purpose, assets of Sarah Liddard; for it is the settled doctrine of courts of equity, that, where a person has a general power of appointment, and exercises that power, the fund so appointed is liable to answer the demands of his creditors; and till these demands are satisfied, the appointees can take nothing. If the English stock be permitted to be transferred to the defendants, the plaintiff will be left without remedy.

Mr. Shadwell and Mr. Ching, *contrà*:

About and shortly before the time when the French stock was purchased, a large sum was received in respect of Mrs. Liddard's share of her father's residuary estate, which her husband, according to the trusts of the settlement, was bound to leave at the wife's absolute disposal; and the probability is, that the French stock was purchased with that money and with the proceeds of the sale of Mrs. Liddard's plate. The basis of the plaintiff's claim is merely conjectural.

But even if it be assumed that the French stock belonged to the bankrupt, the only relief to which the plaintiff could be

† 1 Simons, 294.

entitled would be to have the defendants, in whose name the stock is standing, declared trustees for him. His interest in the French stock cannot give him a lien on the English stock. In what sense can he describe himself as a creditor of Mrs. Liddard? During these alleged transactions, she was a married woman; and if the property was unfairly transferred into her possession, she could not thereby incur a general liability; and the assignee of the husband would not acquire any rights against her separate property.

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THE LORD CHANCELLOR :

March 31.

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A person of the name of William Liddard, who is stated to have carried on trade here, and to have been subject to the bankrupt laws sold, it is alleged, in the year 1822, his household furniture and all his property in this country, the produce of which was between 1,700*l.* and 1,800*l.* That money was invested, through the agency of Rothschild & Co., in the French funds, and Liddard afterwards went to reside in Paris. In the following year, a commission of bankrupt issued against him in England. Some time after the commission of bankrupt had issued, and after the appointment of assignees, he transferred the French stock to his wife Sarah Liddard. Sarah Liddard afterwards died, and she, previously to her death, as it is admitted in the answer, transferred this property to her sisters, of whom Susannah Clay was one. If this statement be correct, the stock so transferred was the property of the assignee; and the present bill is filed by the assignee of Liddard against Susannah Clay and other persons interested in this fund, or supposed to be interested in it.

Sarah Liddard had, under a settlement executed by her father in the year 1821, an absolute power of disposition over a sum of money in this country in the funds—1,500*l.* 3 per cents. She also, under her marriage settlement, executed in 1813, had an absolute power of disposing of 59*l.* Long Annuities, and of another sum of 1,000*l.* 3 per cent. stock.

Looking at the case it appears to me that the strong probability is, that the fund, which was transferred by Sarah Liddard to Susannah Clay—the sum invested in the French funds—was

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the property of the bankrupt; *that it was the produce of the property, with which the bankrupt had carried on business in this country, and which he had afterwards invested in the French funds; and if so, it belongs to the plaintiff.

The question before me is, how far ought the Court to interfere by injunction to restrain the transfer of property in the English funds, which the defendants have derived from Sarah Liddard?

Of the property which Sarah Liddard disposed of by her will, she had an absolute power of appointing the 1,500*l.* 3 per cents., the 59*l.* Long Annuities, and the 1,000*l.* 3 per cents. These sums, therefore, must be considered as her property, and subject to the payment of all debts to which she was liable. Under these circumstances, it appears to me, that, as she has executed an appointment in favour of Susannah Clay, one of her sisters—as Susannah Clay, having taken out administration in this country, is about to return to France—as the parties interested under Mrs. Liddard's will reside there, and as she, if not prevented, will probably remove the property thither—this Court ought to interpose for the purpose of preventing the removal of these funds at present, upon which, if the evidence turns out sufficient to support the facts of the case, as I think it will, the assignee will have a claim. I think, therefore, the VICE-CHANCELLOR was right in ordering, that, as to the 1,500*l.* 3 per cents., the parties should be restrained from making a transfer.

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The VICE-CHANCELLOR was of opinion that there was a difference between the 1,500*l.* 3 per cents., on the one hand, and the 59*l.* Long Annuities, and the 1,000*l.* 3 per cents., on the other. Upon looking at the documents and papers before me, I see no difference whatever between *the funds. It is perfectly clear that Sarah Liddard, in the events which have occurred, had an absolute power of disposal over the 59*l.* Long Annuities, and also over the 1,000*l.* 3 per cents.; and if she has exercised the power, it appears to me that, under such circumstances, the Court would not be justified in allowing a transfer of the last mentioned funds to take place, the effect of which would be to render the further proceedings of the plaintiff nugatory.

I think the injunction granted by the VICE-CHANCELLOR ought to be continued, and that it should be extended both to the 59l. Long Annuities, and to the 1,000l. 8 per cent. stock.

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v.
CLAY.

HICHENS *v.* CONGREVE.

(4 Russ. 562—577; 1 Russ. & Mylne, 150, n.—152, n.; S. C. 6 L. J. Ch. 167.)

1828.
May 2, 3.

[THIS was a report on demurrer for want of parties of a case of which a report on further proceedings, taken from 1 R. & M. 150, n., will be found in a later volume of the Revised Reports.]

GORDON *v.* CALVERT.

(4 Russ. 581—583.)

1828.
May 21, 22.

[SEE a note of this appeal at the end of the report below (2 Simons, 258), which will be found in 29 R. R.]

Lord
LYNDHURST,
L.C.

1826.
Aug. 14.

LEACH, V.-C.

[71]

EX PARTE CASTELL, IN THE MATTER OF WENTWORTH, CHALONER AND Co.

(5 L. J. Ch. 71, 72; S. C. 2 Gl. & J. 124.)

Five persons are co-partners in one bank, and four of them are co-partners in another bank; in consequence of their banking transactions, the smaller firm becomes indebted to the larger, and a commission issues against the five co-partners: Held, that the larger firm is entitled to prove against the less, the debt due to it from the latter.

[*72] WENTWORTH, Chaloner, the two Rishworths, and Woolley, carried on the trade of bankers in co-partnership at York; Wentworth, Chaloner, and the two Rishworths, carried on a like business in partnership at Wakefield. A commission of bankrupt issued *against all the five partners. The two firms had banking transactions with each other; the result of which was, that, at the date of the commission, upwards of 110,000*l.* was due from the Wakefield bank to the York bank.

Some of the creditors of the York bank presented a petition, praying that the partnership of the five might be declared entitled to prove that sum against the partnership of the four.

Mr. Hart was in support of the petition:

Mr. Heald, contra.

The argument turned wholly on the doctrine laid down in *Ex parte Sillitoe*.†

THE VICE-CHANCELLOR:

According to the printed report of the judgment of the LORD CHANCELLOR in *Ex parte Sillitoe*, he proceeded on this principle: That the general rule in bankruptcy is, that a partner in a firm against which a commission issues shall not prove in competition with the creditors of the firm, who are, in fact, his own creditors; that this general rule admitted of no exception, unless where the partner, to whom the firm was indebted, carried on a distinct trade, and the debt from the firm was due to him in respect of that distinct trade; that the case of two or more partners

† 26 R. R. 204 (2 L. J. Ch. 137; 1 Gl. & J. 374).

carrying on a distinct trade was the same case as that of one partner carrying on a distinct trade; and that, though the separate estates of the firm of ironmongers might have proved the debt against the larger firm, if it had accrued due by a dealing in their trade as ironmongers; yet they could not prove it, inasmuch as it had accrued by the loans of money.

Now, though it is impossible that any person can entertain more deference for the opinion of Lord ELDON than I do, yet, where my understanding is not entirely convinced, I consider it to be a duty I owe to the public to express that difference of opinion. I concur in all the doctrine laid down by the LORD CHANCELLOR in *Ex parte Sillitoe*, except in this proposition—that there is no difference between the case of one partner carrying on a distinct trade, and the case of two or more partners carrying on a distinct trade. As a general rule, a firm of one partner cannot prove against the joint firm, because the creditors of the joint firm are his creditors, and he would be taking from his creditors what ought first to be applied in payment of their debts. But, where a firm consists of two or more partners, who carry on a distinct trade, the creditors of the larger firm are not the creditors of the smaller firm, and the smaller firm in proving against the larger does not prove against their own creditors. On this reasoning I did apprehend (and I am not yet convinced of my error), that the smaller firm is in all cases entitled to prove against the larger, and that it matters not whether the debt arises from goods sold or from monies advanced by the smaller firm to the larger.

Even consistently with the limitation of the doctrine, as laid down by the LORD CHANCELLOR in *Ex parte Sillitoe*, the petitioners are entitled to prove. The York Bank placed large sums of money in the hands of the Wakefield Bank; and, at the date of the commission, the balance thus in the hands of the Wakefield Bank exceeded 110,000*l.* That was in the course of their trade as bankers: and, therefore, even according to the limited position laid down in *Ex parte Sillitoe*, this balance would be the subject of proof.

Ex parte
CASTELL,
In re
WENT-
WORTH,
CHALONER,
AND Co.

1826.
July.

TILBURY v. WAKEFORD.

(5 L. J. Ch. 73—74.)

LEACH, V.-C.
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A testatrix directs that her trustees (who were also her executors) should, within a year after her decease, pay to the several persons named in a schedule to her will, the sums set opposite to their respective names, as vested and transmissible interests: in a subsequent clause she gives 3,000*l.* to the trustees, upon trust to invest the same, and pay it to A. on her attaining twenty-one, with a proviso that it should fall into the residue if A. died under twenty-one: by the schedule to her will she gives to her executors 600*l.* in trust for A. in addition to the 3,000*l.* given by the will: Held, that the legacy of 600*l.* was not affected by the contingency to which the 3,000*l.* was subject, but vested immediately.

MARY HARRIES, by her will dated the 11th November, 1822, after making various devises and bequests, directed that the trustees named in her will should, within one year after her decease, or so soon after as they could get in any monies which she might have outstanding upon mortgage or any other security (and she directed her said trustees to call in the same with all convenient speed after her decease,) apply and pay to the several persons whose names should be contained in the schedule of her legacies annexed to her said will, and which said schedule she directed should be taken as part of her said will, and which it was her intention should be in her own handwriting, the several legacies or sums of money, either in words or figures, set opposite to the respective names, and remaining unobliterated; and which said several legacies she thereby gave and bequeathed to the several persons, whose names should be placed opposite thereto; and she desired that the same should be paid, if possible, within the time aforesaid to her said legatees, as vested and transmissible interests.

In a subsequent clause, she directed that her said trustees, and the survivor of them, his executors or administrators, should lay out and invest the sum of 3,000*l.* either on Government or real security, in their own names or name, and pay and apply the interest, dividends, and annual produce thereof as the same should be received, or so much thereof as they should think necessary, in aid of certain other provisions thereinbefore made for that purpose, towards the maintenance and education of her

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said niece, Catherine Harries Tilbury, during her minority ; and should lay out and invest the overplus thereof, as well as of the rents of her said leasehold premises respectively, freehold offices by her occupied with part thereof, and right of way throughout the said stable-yard, and also should lay out and invest the interest thereof from time to time, in order that the same might accumulate by way of compound interest during her minority, upon trust, upon her attaining her age of twenty-one years, to pay or transfer the same unto the plaintiff, Catherine Harries Tilbury ; but if the plaintiff should die before she should have attained her said age of twenty-one years, then in trust, from and after her decease, that her said trustees, *and the survivor of them, his executors or administrators should stand possessed of the said principal sum of 3,000*l.* or the interest thereof, or so much thereof as should be unapplied for the purposes aforesaid, as a part of the residue of her, the testatrix's, personal estate.

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In the schedule annexed to the will, and which was referred to therein, were the following words, in the hand-writing of the testatrix. "I give and bequeath to my executors, Joseph Wakeford and Thomas Davis aforesaid, the sum of 600*l.* in trust for my niece Mary Catherine Harries Tilbury, over and above, and in addition to the above 3,000*l.* given her by my will."

The legatee was an infant.

The question was, whether the legacy of 600*l.* vested in the legatee on the death of the testatrix ; or whether it was subject to the contingency to which the 3,000*l.* was subject—namely, the contingency of the legatee's attaining the age of twenty-one.

Mr. Horne appeared for the plaintiff, the legatee.

Mr. Tinney, *contra* :

On behalf of the plaintiff, it was argued that the testatrix had made a clear distinction between the legacies contained in the schedule, and the gift of 3,000*l.* ; so that it would be altogether unreasonable to extend to the former, a contingency which was expressed with respect to the latter only. The legacies given by the schedule were to be paid, if possible, within a year after

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the testatrix's decease; and they were declared to be vested and transmissible interests. The 600*l.* was a legacy given by the schedule; it was therefore a vested interest, by the express words of the will; and was to be paid within a year after the testatrix's decease. The words "over and above, and in addition to the 3,000*l.*" did not imply, that the gift of 600*l.* was to have all the qualities of the gift of 3,000*l.* They denoted simply that it was a benefit given over and above the latter legacy: and it unquestionably was an additional benefit, even though it were to vest and become payable at a different time.

On the other hand it was contended, that, by the schedule, the 600*l.* was given in addition to the 3,000*l.*; and the thing added must be subject to the same contingencies as the thing to which it is added. When we look to the will, we find that the 3,000*l.* is a contingent legacy: therefore, the 600*l.* must be contingent too. The plain and direct words accompanying this individual gift in the codicil, cannot be controlled by the general words, which are used prospectively with reference to the legacies which the testatrix meant to include in her schedule.

The VICE-CHANCELLOR thought that the question was one of nicety: but ultimately he stated his opinion to be, that, having regard to that clause of the will in which the testatrix declared that her scheduled legacies were to be vested and transmissible interests, the legacy of 600*l.* was not subject to the contingency which affected the legacy of 3,000*l.*

The decree declared that the plaintiff was entitled to a vested and transmissible interest in the 600*l.*

COCKERELL *v.* BARBER.

1826.

(5 L. J. Ch. 77—83; S. C. 1 Sim. 23; affirmed on appeal, 2 Russ. 585—599.)

LEACH, V.-C.

A testator gives a legacy to his friend and partner P.; and he afterwards appoints him one of his executors, and gives him other benefits much greater than those bequeathed to any of the other executors: the legacies bequeathed to P. are not to be considered as bequeathed to him in his character of executor.

On Appeal
Mar. 31.
LORD ELDON,
L.C.
[77]

An executor in India collecting assets in India is entitled to a commission of 5 per cent. even upon assets collected for the payment of legacies given to himself.

He is entitled also to his commission, though part of the assets are in the hands of a mercantile house in which he is a partner, and in which the testator was at the time of his death a partner.

CHARLES BARBER, being in Calcutta, made his will, whereby he gave to his friend John Belli of Calcutta aforesaid, esquire, the sum of one hundred thousand sicca rupees, to be paid to him immediately after his, the said testator's death; and in case the said John Belli should die in his lifetime, then he gave and bequeathed the same to his friend Mrs. Eliza Stewart Belli, the widow of the said John Belli, to be paid to her after his, the said testator's death, as soon as conveniently might be. Then he proceeded as follows:—

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“I give and bequeath unto my friend and partner, John Palmer, of Calcutta aforesaid, esq. the sum of 100,000 sicca rupees, to be paid to him after my death, as soon as conveniently may be. I also give and bequeath to the said John Belli, Charles Cockerell of Calcutta aforesaid, esq., the said John Palmer, and the said Mrs. Eliza Stuart Belli, of Southampton, in the kingdom of Great Britain, my executors and executrix hereinafter named, and to the survivors or survivor of them, and the executors and administrators of such survivor, the sum of 30,000 sicca rupees upon this special trust, that they, my said executors and executrix, or the survivors or survivor of them, or the executors or administrators of such survivor, shall and will, as soon as conveniently may be after my death, put and place out in this country, or in England, the said sum of 30,000 sicca rupees, on loan, at interest, in such good security, or in the public funds, as they my said executors and executrix, or the survivors or survivor of them, their executors or administrators, shall deem proper, upon this

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special trust, to pay the annual produce or interest of the said sum of 30,000 sicca rupees to Mrs. Elizabeth Mary Burgh, widow of my late partner, John Burgh deceased, during her natural life, and after her death to pay, assign, and transfer the said principal sum of 30,000 sicca rupees, and such interest as may have accrued due thereon from the time of the death of the said Elizabeth Mary Burgh, to the children of the said John Burgh, by the said Mrs. Burgh, share and share alike, or to the survivors or survivor of them, on their respectively attaining the age of twenty-one years. But I bequeath this legacy on this express condition : that the said Elizabeth Mary Burgh, her heirs, executors, and administrators, do and shall permit John Palmer, (one of my executors hereinafter and hereinbefore mentioned) his heirs, executors, administrators, and assigns, to retain quiet possession of the moiety, or half part of a large three-story upper round house and premises, situate in the Lol Bazaar, Calcutta, and which moiety, or half part, he purchased from me, as executor and trustee, and from Mr. William Johnson and Alexander Colin, executors of the said John Burgh deceased : for a sum of money, considerably more than it was worth, with the view of benefiting the estate of the said John Burgh deceased : and in case the said Mrs. Burgh, her heirs, executors, or administrators, should, under the pretence of dower, or any other pretence whatever, be induced to trouble the said John Palmer in the quiet possession of the said moiety, or half part of the said house in the Lol Bazaar, I do hereby give and bequeath the said sum of 30,000 sicca rupees to the said John Palmer as a recompense for the expense and trouble he may be put to in defending his right to the moiety, or half part of the beforementioned premises : and I request that my executors and executrix, before they invest the said sum of 30,000 sicca rupees for the use of the said Elizabeth Mary Burgh, and her children, will call upon her to execute such papers or deeds as may preclude the possibility of the said John Palmer being disturbed in the possession of the moiety, or half part of the said premises, or any part of the said moiety, either by herself, her heirs, executors, administrators, or assigns ; and if the said Mrs. Burgh should refuse to sign such papers, I do then direct my said executors and executrix immediately upon such

refusal to pay the said legacy of 30,000 sicca rupees to the said John Palmer, and I do hereby declare in the event of such refusal, that the bequest hereinbefore made to the said Elizabeth Mary Burgh, and her children after her death, should be null and void. And whereas, I am possessed of the other moiety (saving and except one-eighth part of the said moiety, sold to my partner, John Caulfield) of the said upper round house and premises, situated in the Lol Bazaar as aforesaid, and in which an agency business is carried on by myself, the said John Palmer, and the said John Caulfield, under the firm of Barber, Palmer, & Co.; I do hereby *give, devise, and bequeath my said moiety, of the house, ground, and premises, (save and except the eighth part of the said moiety sold to John Caulfield as aforesaid,) to the said John Palmer, his heirs and assigns for ever." He then gave some small legacies, and bequeathed the residue of his property to his mother, and appointed John Belli, Charles Cockerell, John Palmer, and Mrs. Eliz. Stuart Belli, his executors and executrix of that his last will and testament.

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The testator afterwards made a codicil to his will, which contained the following clause: "I give and bequeath to my friend and partner, John Palmer, (one of my executors named in the foregoing will,) in addition to the sum of 100,000 sicca rupees therein bequeathed him, also the estate in the Lol Bazaar, and the conditional legacy of 30,000 sicca rupees, the further sum of 20,000 sicca rupees."

Mr. Barber died, and his executors proved his will. Mr. Cockerell was not in Bengal at the time; a great part of the assets of the testator were in the hands of the mercantile house, in which he and Palmer were partners.

A suit having been instituted for the administration of the assets, Palmer was made by supplemental bill a party to it. In accounting for the assets which had come into his hands, he claimed commission at the rate of 5 per cent. on the amount of the assets collected by him.

The persons beneficially interested in the residue contended, on the other hand, that he was not entitled to commission. First, because the legacy excluded him from any right to commission. Secondly, he at least was not entitled to commission

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on so much of the assets as went in satisfaction of his own legacies, or as were at the testator's death in the hands of the mercantile house, in which he, Palmer, was also a partner.

The VICE-CHANCELLOR referred it to the Master, to inquire and state whether, according to the course of the Court in India, an executor who is also a legatee, but having his legacy not given to him in the character of executor in India, was entitled to commission at the rate of 5 per cent. for collecting the estate of a testator in India; and in case the Master should find, that, according to the usage in India, such executor and legatee was entitled to such commission, then it was ordered that the Master should inquire and state to the Court, whether John Palmer was entitled to such commission upon his receipt of such part of the said testator's estate, as was necessary for the payment of his legacies, or any and which of them; and also, whether he was entitled to such commission, in respect of so much of the said testator's estate as at the time of his death consisted of money or securities for money, in the hands of John Palmer and his copartners in trade in India, of which the said testator was one, or of any or either of them; and the Master was to be at liberty to state any special circumstances arising on any of the inquiries.

The Master found, that, according to the course of the Court in India, and the usage there, an executor who was also a legatee, but, having his legacy not given to him in the character of executor, was entitled to commission at the rate of 5 per cent. for collecting the estate of a testator in India, and that he was so entitled on all sums collected and received by him, and with which he was chargeable in his account of assets without distinction as to the same being necessary for the payment of legacies or debts, or otherwise, and without regard to the circumstance, when it occurs, that such assets have arisen from debts due to the testator by a mercantile house, in which the executor himself was a partner, and liable as such; and he was therefore of opinion that John Palmer was entitled to such commission upon his receipt of such part of the said testator's estate as was necessary for the payment of his legacies, or any of them, and that he was entitled to such commission in respect

of so much of the testator's estate, as at the time of his death consisted of money, or securities for money, in the hands of the said John Palmer and his co-partners in trade in India, of which the said testator was one, or of any or either of them.

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Palmer presented a petition, praying that the report might be confirmed, and that it might be declared that he was entitled to his commission.

Some of the persons beneficially interested in the residue presented a cross petition, for the confirmation of the report, but praying further that it might be declared, that, notwithstanding the allowance of the commission claimed by Palmer, was according to the course of the court in India, yet, inasmuch as the same was contrary to the rules and decisions of this Court of Chancery, in the administration of testator's estates and effects, Palmer was not entitled to the said commission, having been allowed and received the legacies bequeathed to him by the testator.

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Mr. Hart and Mr. Sugden appeared to oppose *Mr. Palmer's* claim :

* * *Primâ facie* a legacy to an executor is given to him as executor : the testator must be presumed to have had in his contemplation the office which he imposes on the legatee. * * *

No stress can be laid on the expressions of friendship which occur in the will. The appointment of a person to be an executor is a stronger mark of confidence than any mere words can convey. Such phrases have occurred in several of the cases where it has been held, that the legacy was given to the executor in his character of executor.

Mr. Pepys (contra) insisted, that it was apparent upon the face of the will, that the bequests were made to *Mr. Palmer*, not in respect of his being one of the persons named executors, but as being the object of peculiar bounty on the part of the testator.

The following cases were cited :

Reed v. Deraynes, 2 R. R. 48 (3 Br. C. C. 95 ; 2 Cox, 285).

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Abbot v. Massie, 3 R. R. 79 (3 Ves. 148).
Stackpoole v. Howell, 9 R. R. 200 (18 Ves. 417).
Dix v. Reed, 24 R. R. 171 (1 Sim. & St. 237).
Freeman v. Fairlie, 17 R. R. 7 (3 Mer. 24).

THE VICE-CHANCELLOR :

Generally speaking, our settlements abroad have adopted the English law in the administration of assets. Local circumstances, and motives of policy derived from those local circumstances, have occasioned some partial changes; and upon that principle it is, that the courts of law in India, in order to induce proper persons to accept the office of executor, have adopted a rule unknown to the law of this country—namely, to permit an executor to charge a commission upon the amount of assets collected by him in India. If the assets of a person dying in India, and collected in India, come to be administered, not in India, but by the courts here, the English courts are of necessity bound to follow that rule of policy which has been adopted in India; and if, in the event of the accounts being passed in India, the executors would have been entitled to a commission of 5 per cent., it would be the height of injustice to withhold that allowance, because the accounts happened to be passed in this country and not in India. It has therefore been long established, that the courts here must follow that peculiarity in the law of India,—that executors, in passing *their accounts here, shall, in respect of assets collected in India, be allowed the same commission which would have been allowed them there.

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Mr. Palmer, one of the executors here, resided in India, and collected a large portion of assets there. When this suit was instituted, Mr. Palmer, who is a co-defendant, for some time did not appear to it, and, according to my recollection, it was only at a late period of this cause that he became an accounting party. At the hearing of this cause, as it regarded Mr. Palmer, which was long subsequent to the hearing as it regarded the other parties, I was of opinion that this Court must, upon the principle I have stated, and the authorities referred to, follow the law of India, and I directed an inquiry, whether an executor having a legacy was, or not, entitled to the commission according

to the course of the court in India. That order was afterwards reheard upon the specialties of the case, not upon the idea that this executor, Mr. Palmer, took his legacy in the character of executor, and that, therefore, it was to be considered as intended by the testator as his only compensation for the trouble of the office. The specialty of the case in respect of the assets and debts, was this, that a great portion of the testator's property was embarked in an agency-house in Calcutta, in which Mr. Barber, the testator, was jointly a partner with Mr. Palmer, his executor, and with Sir Charles Cockerell, one of his other executors. Generally speaking, by the course of the court in India, an executor would be allowed a commission of 5 per cent. in respect of the collection of assets in that country; yet when those assets were in the possession of the executor, under the peculiar circumstances of this case, it was to be considered, whether he was entitled to that compensation. With a view therefore to that special circumstance, and to another circumstance which was urged in argument at that time—namely, whether an executor was entitled to commission on the assets for the payment of his own legacy,—I varied the order, by putting specially to the Master those two cases, directing the Master to inquire, whether, according to the course of the court in India, an executor having a legacy given to him, not in the character of executor in India, was entitled to commission upon assets, which were to pay his own legacy, and also upon assets engaged in the mercantile house in which the testator and the two executors were partners. The Master in his report says, “A state of facts on behalf of the defendant, John Palmer, and a state of facts on behalf of Richard Barber, one of the next of kin of the said testator, having been laid before me, together with a statement of a case, and the opinion of Mr. Serjeant Spankie thereon, which case and opinion the solicitors for the several parties consented to my receiving in evidence, and the probate of the will and codicil.” Then the Master adopts the opinion given by Mr. Serjeant Spankie: and, following Mr. Serjeant Spankie's opinion, he states to me, that, according to the course of the Court in India, an executor is entitled to a commission upon the assets for the payment of his

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own legacy, and he is also entitled to a commission upon assets which were found in the mercantile house, in which the testator was a partner with two of the executors.

Now on the part of the next of kin who are affected by this decision of the Master, a petition is presented, not impeaching the Master's finding, but insisting, that, notwithstanding that finding of the Master, the executor is not to be entitled to this commission. There is no dispute, therefore, on the part of those who resist the order, that the Master has most correctly found the fact, nor can there be; because all the parties, and the next of kin who are affected by the Master's opinion, do expressly agree that Mr. Serjeant Spankie's opinion is to be received as evidence of the law of India, and it is in truth the only evidence tendered by the other parties, which therefore is an express admission, that, for the purposes of this inquiry at least, they will adopt Mr. Serjeant Spankie's opinion, as correct evidence of the law of India, and will be bound by it. It was therefore with much surprise that I heard from one of the counsel for the next of kin, that the Court was not to consider the opinion given by Mr. Serjeant Spankie as evidence of the law of India for the purposes of this case. I am bound upon principle to consider it as evidence; I am bound to do so upon the admission of the parties themselves.

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The courts of this country, adopting, as they were in justice bound to do, the rule that *prevailed in India with respect to allowances to be made to executors, have been called upon to consider a case, in which the will gave a legacy specially to an executor, declaring it to be in respect of his trouble in the execution of his duty as executor. The question there, was not a question of what was the law of India, but a question, what was the intention of the testator in the expressions used by him, as applied to the law of India. Now the Court could not do otherwise than hold, that the testator there meant that the legacy, which he had specially given for the care and trouble of his executor in the performance of the duties of that office, should be received by him as a compensation for his trouble, and therefore, he had his election, either to take the office or to renounce the office; but if he accepted the office, he was bound to perform

the duties of it. The expressions used were considered as a declaration of the intention of the testator, that, accepting the office, he should be excluded from the commission which the law of India would have given him, and should be paid the legacies which the testator had expressed to be a sufficient compensation for the trouble of performing his duty as executor, and that he could claim nothing more. It is said in this case, that the same principle applies to these legacies, and that they are given to Mr. Palmer expressly as legacies, for the performance of his duty as executor; and that he must of necessity, therefore, be confined to that sum which the testator has thought fit to say shall be his compensation. The question is, whether that was the true intention of this testator—whether, upon the face of this will, it does appear, that the testator meant that Mr. Palmer should, in respect of his trouble as executor, be confined to the particular legacies which he has thought fit to bestow upon him here.

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There is only one Judge who ever adopted the opinion that a legacy given to an executor was to be considered as carrying with it an implied condition, and that he could not accept the legacy without taking upon himself the duties of the office. No other Judge has adopted that opinion, and the MASTER OF THE ROLLS, who entertained it, never carried it to the effect of a decision. The case in which he expressed it was ultimately not decided; it was in truth a very doubtful one, and might warrant strong expressions of doubt on the part of the Judge: but those expressions of doubt induced the executor to take upon himself the office, and therefore to remove all question; admitting, therefore, as far as that admission was necessary, that, without having taken upon himself the office, there might be considerable doubt as to his title to the legacy, it is no decision upon the point: and the doctrine there alluded to is to be found in no other case, nor has it been adverted to by any other Judge.

I had occasion to consider this subject very fully not long since, and my opinion, from an attention to all the cases was, that *primâ facie*, it is to be intended that when a testator gives a legacy to a person whom he appoints executor, and it does not appear that other motives bear upon the intention of the testator,

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it shall be intended that that legacy has a reference to his office, —that it is in respect of the trouble imposed on him, that such benefit has been extended to him,—and that it lies upon the executor to shew, by the language to be found in the will, that such was not the intention of the testator in the gift, and that he had other motives than mere reference to the character of an executor. Now let us read this will, and see whether, upon the face of it, any person can say that it was the intention of the testator in the gift of these legacies to Mr. Palmer, to give them to him in respect only of his character of executor. The testator begins his will in these words:—

“I give and bequeath unto my friend and partner, John Palmer, of Calcutta aforesaid, esq. the sum of 100,000 sicca rupees, to be paid to him after my death, as soon as conveniently may be.”

The first observation that arises upon this passage is, that, Mr. John Palmer being afterwards named one of the executors of the testator, I must, according to the argument, assume, that this gift is given to him expressly in that character. Now, the supposition that the gift is given to him in that character is extremely inconsistent with the expressions: he calls Mr. Palmer, “my friend and partner, John Palmer,” and classes him therefore among his friends. Then follows this legacy, offering most important *observations—“I also give and bequeath to the said John Belli, Charles Cockerell, of Calcutta aforesaid, esq., the said John Palmer, and the said Mrs. Eliza Stuart Belli, of Southampton, in the kingdom of Great Britain, my executors and executrix hereinafter named, and to the survivors or survivor of them, and the executors and administrators of such survivor, the sum of 80,000 sicca rupees,” upon certain trusts for a Mrs. Eliz. Burgh. He declares, however, that she shall not be entitled to this legacy of 80,000 sicca rupees, unless she will confirm the title of Mr. Palmer, (the same gentleman, who is supposed to be no object of this testator’s bounty, except in his character of executor,) to a moiety of the house in which the business was carried on, and which had been sold to Mr. Palmer under particular circumstances. He gives to her this legacy expressly upon the condition that she shall confirm the title of

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Mr. Palmer to that moiety of the house. This in truth, therefore, is a legacy rather to Mr. Palmer than to Mrs. Burgh. The testator proceeds in the next place to give the other moiety of the house, which was his, the testator's, own property, to Mr. John Palmer and his heirs. There is no legacy at all to Mr. Cockerell. Mr. Belli and Mrs. Belli, being both named executor and executrix, have not each a legacy of 100,000 sicca rupees, but there is a legacy of 100,000 sicca rupees given to Mr. Belli if he survives the testator, or, if he does not survive him, to Mrs. Belli.

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Can it be said therefore upon reading this whole will, that the testator, in his gifts to Mr. Palmer, had in contemplation the character of executor only, these gifts being, to a very large amount, much greater than those given to any other person whom he had appointed an executor, and to one of these persons no gift whatever being given? Gifts to persons simply in their character of executors would naturally be equal in amount, because the trouble is equal to all. Mr. Belli was undoubtedly resident in India, where Mr. Barber resided; and therefore the slight circumstance of Sir Charles Cockerell's happening not to be in India, cannot in construction make the least difference.

The codicil is in these words—"Whereas, I, Charles Barber, of Calcutta, at Fort William in Bengal, being about to depart for England do by this my writing, which I declare to be a codicil to my foregoing will, and direct to be taken as part thereof, give and bequeath to my friend and partner, John Palmer, one of my executors named in the foregoing will, in addition to the sum of 100,000 sicca rupees therein bequeathed him, also the estate in the Lol Bazaar, and the conditional legacy of 80,000 sicca rupees, the further sum of 20,000 sicca rupees." He does not give a shilling to any other executor or executrix named in his will; leaving therefore the other executors and executrix all imperfectly provided for, in comparison with the amount of the gifts to Mr. Palmer.

I am of opinion that, upon reading this will and codicil, there is no pretence for saying, that this will and codicil do not form clear and decisive evidence, that the testator here, in his bounty to Mr. Palmer, regarded him not simply in the character of

COCKERELL *vs.* BARBER. executor, but in the character of a near and dear friend, whom he considered a special object of his regard. I feel myself bound therefore to declare that he is entitled to the commission according to the course of the Court in India, in the collection of all assets, either for the payment of his own legacies or for collecting the assets from the mercantile house.

[2 Russ. 590.] The parties beneficially interested in the residue appealed from this decision as reported in 2 Russell 585—599.

[592] On this appeal the point principally argued was whether Palmer took his legacies as executor, the other points were merely alluded to.

[2 Russ. 598.] [After argument the LORD CHANCELLOR said that the old rule was that if A. B. was named executor and had a legacy given to him he should not have the legacy if he did not take the office. And he expressed regret that the rule should have been frittered down and have given way to questions of construction upon the effect of the whole instrument and every part thereof, and he added,] *I wish we could get back to the old simple rule, but I fear it is now too late.

[Lord ELDON's final judgment, communicated to the parties in writing after he had retired from office, contained the following passage:]

"I think it very unfortunate that the Court should have established the distinctions to be found in the cases, but such having been made they must now be acted upon, and I cannot satisfy myself that the Vice-Chancellor's judgment is wrong or ought to be reversed as to either point.

1827.

June,
July 15.

LEACH, V.-C.

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MORRIS *v.* DAVIES.

(5 L. J. Ch. 177.)

[SEE this case reported on appeal to the House of Lords, 5 Cl. & F. 163.]

K. B. EASTER TERM.

DAVIS *v.* MORGAN.

(4 Barn. & Cress. 8—14; S. C. 6 Dowl. & Ry. 42.)

1825.
April 21.

[8]

Where an easement has been, in consideration of a money payment, granted for a term of years, and the term is expired, the continued use by the grantee or those claiming under him with the permission of the person claiming under the grantor, of the easement, is a good consideration for, and a ground for implying, a promise to pay a reasonable sum for the privilege; although the use of the easement has ceased to be a detriment to the estate of the grantor.

INDEBITATUS ASSUMPSIT, for the use, occupation, and enjoyment of a certain river, stream, or watercourse, and of the water running, flowing, and being therein; and also a certain wear erected and being in *and across the said river, stream, or watercourse, and of the liberty or privilege of continuing and keeping the said wear at a certain height, to wit, the height to which the same had been theretofore raised; and also of certain lands and premises by the defendant, and at his special instance and request, and by the sufferance and permission of the plaintiff, for a long time before then elapsed, had held, used, occupied, possessed, and enjoyed. Plea, *non-assumpsit*. At the trial before Littledale, J., at the Monmouth Spring Assizes, 1825, the following appeared to be the facts of the case: For several years before the 26th of June, 1764, Lady Ann Hamilton had been seised or possessed of an ancient corn or grist mill, together with an ancient course or stream of water diverted out of the river Gwilly, in the county borough of Carmarthen, and flowing from thence, down, unto, and for the use and service of the said mill, as appurtenant to the same. And Robert Morgan, the grandfather of the defendant, had also for several years been possessed of three ancient mills, called the Priory Mills, situate in the said county borough, together with a certain ancient course or stream of water diverted out of the river Gwilly, above the said stream of Lady Hamilton, by means of a head wear formerly erected across the same river, and running and flowing from thence, between and through the lands of

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divers persons, and particularly through certain lands of Lady H., down unto, and for the use and service of his mills as appurtenant to the same. And he had lately and newly, before June, 1764, erected upon other lands below the lands of Lady H., and on or near to the said last mentioned watercourse, an iron furnace, two rolling mills, and other works; and it thereby became *necessary for him to have a much larger supply of water for the use and service of his mills and new erected works, than had theretofore usually flowed along the said last mentioned watercourse; and he had, therefore, then lately widened and deepened the said last mentioned watercourse, in the soil and freehold of Lady H., within her said lands, for the purpose of receiving and conveying a greater quantity of water for the use and service of his mills and new erected works, and likewise raised and heightened the said head wear across the river Gwilly, about twenty-one inches higher than the same was before, and ought to have been, and thereby diverted the greatest part of the water of the river Gwilly into the said watercourse, for the use and service of his mills and new erected works; so that the water of the river was prevented from flowing in its ancient course down to the mill of Lady H. in so copious a manner as it had theretofore done, and thereby the mill of Lady H. became of no use for the want of a sufficient supply of water for working the same. Lady H. in 1762 brought an action against R. Morgan, and recovered 30*l.* damages and costs, by reason of the deepening and widening of the watercourse; and afterwards brought a second action in the Court of Exchequer for the recovery of subsequent damages sustained by her. In order to put an end to the same, and prevent all further suits and disputes, R. Morgan agreed to take a grant and lease from Lady H., of the use and benefit of the watercourse so widened and deepened, and of the liberty of diverting so much of the water of the river Gwilly into and along the same, as should be convenient for the use and service of the mills and new erected works of him, R. Morgan. By lease of the 26th June, *1764, reciting the facts above stated, Lady H., in consideration of the sum of 1,500*l.* paid to her by R. Morgan, granted and demised to the said R. Morgan, his executors, &c., all the full

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and free use and benefit of the said watercourse within the lands of her, Lady H., in the same manner as it was then widened and deepened as aforesaid, and the full and free liberty of diverting and turning so much of the waters of the river Gwilly into and along the said watercourse, as should be necessary and convenient for the use and service of the said mills and new erected works of him, R. Morgan. Habendum from the 24th June then last past, for ninety-nine years, if three persons therein named should so long live, at a rent of sixpence per annum. The deed contained the following clause: "And the said Lady H., for the considerations aforesaid, doth for herself and her heirs, acquit, release, and discharge R. Morgan, his executors, &c., of and from all actions, causes of action, trespasses, damages, and demands whatsoever, at any time heretofore accrued or arisen, for or by reason of the widening or deepening of the said watercourse, or diverting the water into and along the same, for the use of the mills and new erected works of him, the said R. Morgan." Soon after the execution of this lease, Lady Hamilton's mill was pulled down, and the grantee and those who claimed under him continued the watercourse, widened and deepened as described in the lease, and the use of the water as thereby granted, until the expiration of the term. The lease expired in November, 1823, by the death of the then last surviving cestui que vie. The reversion in the lands, which formerly belonged to Lady Hamilton, had become vested in the plaintiff; and the defendant, the grandson of R. Morgan the lessee, being *in possession of the Priory Mills, had paid rent to the plaintiff, and had treated with him for a renewal of the grant. Upon this evidence it was objected at the trial, that the action was not maintainable, because there was no consideration for the promise. It was admitted that the waiver of a tort was a good consideration for a promise, but it was urged that the plaintiff could not have maintained any action for a tort, because he could not shew any right to the use of the water, neither he nor those under whom he claimed having had any mills for a period of sixty years. And, secondly, assuming that such an action might be maintainable, it ought to have been brought by the occupiers of the lands, and not by a mere reversioner. The learned Judge was of

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opinion, that after the expiration of the term for which the privilege was granted, the grantor or the persons claiming under her, might maintain an action for a tort ; for, by the recitals in the grant of 1764, it was admitted that Morgan the grantee had committed a wrongful act by deepening and widening the watercourse, and continuing it so deepened and widened, as against him or the person claiming under him ; therefore, it must be taken that the act of continuing it so deepened and widened would have been a wrongful act, except for the permission granted by Lady H. When the term, therefore, for which that permission was granted, expired, the grantee, or the party claiming under him, was guilty of a wrongful act by continuing the watercourse so deepened and widened ; and the grantor or those claiming under her might maintain an action for a tort : it was not necessary, however, to decide the case upon that point, because, by taking the grant, the grantee admitted that Lady H. had a right to grant, and the rent having been paid during the *term, the title of the grantor was admitted till the end of the term, and the grantee or the party claiming under him having after the end of the term continued to occupy the wear by not taking it down, use and occupation was maintainable against him. The tenants of the plaintiff could not have maintained this action, for although the soil might have been granted to them for a term, yet it must have been subject always to the grant of the watercourse.

A verdict was found for the plaintiffs subject to the award of an arbitrator, and liberty was reserved to the defendant to move to enter a nonsuit.

Campbell now moved accordingly, and relied upon the objections taken at the trial.

ABBOTT, Ch. J. :

I am of opinion that the plaintiff was entitled to recover. It cannot be denied that the defendant had received great benefit from continuing the wear and the watercourse in the state to which it had been brought many years before. The bringing it into that state was a wrongful act by the defendant's ancestor,

and Lady Hamilton, through whom the plaintiff claims, complained of this act, and recovered damages in an action. A contract was then made between her and the defendant's ancestor to grant the free use and benefit of the watercourse to the defendant's ancestor for ninety-nine years, determinable on three lives. It is true, that after this agreement Lady H. abandoned the use of her own mill, and perhaps the consideration for her so doing may have been the rent payable by the defendant. The lease has expired, and the defendant having continued to enjoy the benefit of the watercourse, he must be taken to have continued the enjoyment of it by the permission of the owner of the estate, which formerly belonged to *the grantor, and that was a benefit to the defendant, though no prejudice to the plaintiff. The question is, whether the plaintiff is to have any thing for this benefit which the defendant has received. If he is not, the 1,500*l.* paid to the plaintiff's ancestor must be a consideration, not only for the release of damages which had then actually been incurred, but for the enjoyment of the privilege for ever. That, clearly, was not the intention of the parties. I think, therefore, that the defendant having received a benefit by the permission of the plaintiff, there was a good consideration for the promise, and consequently the plaintiff is entitled to recover.

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BAYLEY, J. :

Lady Hamilton was entitled many years ago to the enjoyment of the water, and it was wrongfully applied by the defendant's ancestor to his use. Lady Hamilton consented that the defendant's ancestor should have the use of the water for ninety-nine years, determinable by the death of the survivor of three persons agreed upon. At the expiration of the lease, Lady Hamilton, or her real representative, had a right to have things returned to their former state, and the defendant, at that time, could have no right to have the extra quantity of water which he enjoyed under his lease. Now, as she had sold the use of the water for a certain time only, unless there be some unequivocal act by the defendant to shew that he ceased to use it by her permission, or that of the person who claimed

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under her, it is clear that she or the person claiming under her is entitled to a reasonable compensation for the use of the water so enjoyed by her permission.

LITTLEDALE, J. concurred.

Rule refused.

1825.
April 27.

[25]

EWER v. AMBROSE AND J. BAKER.

(4 Barn. & Cress. 25—26; S. C. 6 Dowl. & Ry. 127; 3 L. J. K. B. 128.)

Where a witness in a trial at law gave evidence at variance with what he had previously sworn in an answer in Chancery: Held, that an examined copy of that answer was admissible to contradict him, and that it was not necessary to produce the original answer.

ASSUMPSIT. Plea in abatement by Ambrose, that S. Baker should have been joined. J. Baker suffered judgment by default. At the trial before Gaselee, J., at the Suffolk Spring Assizes, 1820, the plaintiff called Samuel Baker as a witness, who deposed that he never was in partnership with the defendant. Ambrose produced an examined copy of an answer in Chancery sworn to by the witness. It was objected that the original should have been produced. The learned Judge overruled the objection, and the defendant obtained a verdict, and now

Frere, Serjt. moved for a rule *nisi* for a new trial, on the ground that the examined copy of the answer was improperly received in evidence; and he contended that as the answer was produced to contradict the witness, and therefore to shew that he had been guilty of perjury, it was to be considered as in the nature of a criminal proceeding, and if so the original answer should have been produced: *Rex v. Morris*,† *Lady Dartmouth v. Roberts*,‡ *Rex v. Benson*.§

Per CURIAM :

The evidence admitted in this case might indeed be prejudicial to the character of the witness, but the attempt to contradict him

† 2 Burr. 1189.

‡ 16 East, 334.

§ 2 Camp. 508.

cannot be considered as in the nature of a criminal proceeding, *although the evidence then given might be the ground for subsequent criminal proceedings. The examined copy of the answer was therefore properly admitted.

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*Rule refused on that point, but granted on the ground
that the verdict was against evidence.*

CROZER v. PILLING AND MOORE.†

(4 Barn. & Cress. 26—34; S. C. 6 Dowl. & Ry. 129; 3 L. J. K. B. 131.)

1825.
April 22.
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A plaintiff is bound to accept from a defendant in custody under a *ca. sa.* the debt and costs, when tendered in satisfaction of his debt, and to sign an authority to the sheriff to discharge the defendant out of custody. And an action on the case will lie against a plaintiff for having maliciously refused so to do; and the refusal to sign the discharge is sufficient *prima facie* evidence of malice in the absence of circumstances to rebut the presumption.

DECLARATION stated, that, in Michaelmas Term, 8 Geo. IV., Pilling had recovered a judgment for 54*l.* 19*s.*, and for the obtaining satisfaction of a certain residue of the damages (part having before been satisfied) sued out a *ca. sa.*, indorsed, to levy 32*l.*, besides poundage; that the *ca. sa.* was delivered to the sheriff so indorsed to be executed; that the sheriff afterwards arrested the plaintiff, and detained and had him in custody under the writ, and the plaintiff being in custody as aforesaid, afterwards, to wit, on, &c., at, &c., tendered and offered to pay to the defendant Pilling, by the hands of the defendant Moore, as his attorney, a large sum, to wit, the sum of 34*l.* 13*s.*, in full satisfaction and discharge of the damages, costs, and charges so adjudged to the defendant Pilling, being the sum indorsed on the writ, together with poundage and lawful expences, and being the whole amount lawfully due or demandable of and from the plaintiff to the defendant Pilling under the writ, and demanded of the defendant Moore, as such attorney, to receive the same, in

† Cited in the judgment of LINDLEY, J. in *Phillips v. General Omnibus Co.* (1880) 50 L. J. C. P. 112, 113. Distinguished in judgment of DEN-

MAN J. in *Lee v. Dangar*, '92, 1 Q. B. 231, affirmed '92, 2 Q. B. 337; 61 L. J. Q. B. 780, C. A.—R. C.

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full discharge and satisfaction of the said damages, costs, and charges, and sheriff's poundage, and to instruct and inform the said sheriff that the same were satisfied, and to give the said sheriff authority to discharge the plaintiff from his custody under the writ; *yet defendant, Moore, wilfully and maliciously intending to oppress, harass, and injure the plaintiff, and to cause him to be longer imprisoned and detained by the sheriff under the writ, without any reasonable cause whatever, wilfully and maliciously refused to accept the money tendered, in discharge of the damages, costs, &c., &c., and did not nor would instruct the sheriff that defendant, Pilling, was satisfied of his damages, &c., nor give authority to the sheriff to release the plaintiff out of his custody, under the writ aforesaid, whereby and by reason of the conduct of the defendants in that behalf, the plaintiff was detained in custody under the writ for a long space of time, to wit, &c. There were other counts stating the tender to have been made to Pilling by the hands of Moore, and a refusal by both the defendants to accept the money, or to instruct the sheriff to discharge Crozer. Plea, not guilty. At the trial before Bayley, J., at the Spring Assizes for the County of York, 1825, the plaintiff proved the issuing of the *ca. sa.*, &c., on the 28th of November, 1822, and the arrest of the plaintiff Crozer. Soon after Crozer had been arrested under the *ca. sa.*, he gave notice of his intention to take the benefit of the Insolvent Act, and he was opposed by defendant, Pilling, on the ground that he had not inserted in his schedule certain property, and he was remanded for that cause by the Court. In February, 1824, the debt and costs, amounting to 34l. 13s., were tendered to the defendant, Moore, as the attorney of Pilling, and he at the same time was requested to give an order to the sheriff to discharge Crozer out of custody. The defendant, Moore, refused to give the order for the discharge, upon the ground that Crozer was indebted to Pilling on account of costs incurred in opposing his discharge under the Insolvent Debtors' Act. [*28] *An application was afterwards made to Pilling, and he stated that he should leave the matter entirely to the defendant, Moore. It was objected on the part of the defendant, that the action was not maintainable, on three grounds; first, because a plaintiff was not bound by law to discharge a defendant

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taken in execution upon a tender of the debt and costs, but that it could only be lawfully done by an order of the Court out of which the writ issued ; and, therefore, that if the defendants had given authority to the sheriff to discharge Crozer, the sheriff would not have been justified in discharging him ; secondly, that the tender ought to have been made to the defendant, Pilling, and not to his attorney, Moore ; and, thirdly, that there was no evidence of malice, inasmuch as the costs of opposing the insolvent was a debt *bona fide* due to Pilling. As to the first point, the learned Judge was of opinion, that the plaintiff was bound to accept the debt and costs, tendered in satisfaction of his debt, and to give authority to the sheriff to discharge the defendant. As to the second point, he was of opinion that the attorney upon the record was the person to whom payment ought to have been made. As to the third point, the learned Judge told the jury, that there being no foundation for the refusal of the discharge, that refusal was wrongful, and that it was for them to consider whether it was not maliciously done. The jury found a verdict for the plaintiff, with 50*l.* damages.

F. Pollock now moved for a new trial :

First, he contended, that the debt and costs ought to have been paid or tendered to the plaintiff, and not to his attorney upon the record.

Upon this point the Court intimated a clear opinion that the attorney upon the record was *the proper person to receive payment of the debt and costs, and that the tender was properly made to him.

[*29]

Secondly, the action is not maintainable, because a plaintiff is not bound by law, after a defendant is in custody under a *ca. sa.*, to give an authority to the officer of the law to discharge the defendant out of custody, upon a tender of the debt and costs. The defendant is in custody by virtue of a writ founded on a judgment of a court of law, and the sheriff is entitled to have the authority of the Court out of which the writ issues for the discharge of the prisoner. In *Taylor v. Baker*,† two Judges were

† 2 Lev. 203 ; 3 Keble, 748, 788.

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of opinion that payment to the marshal was no discharge, as against the plaintiff at whose suit the party was in execution; but WILDE, J., was of a different opinion.

(BAYLEY, J: In 2 Levinz, 208, the Court is said to have decided, that the plea of payment to the marshal was bad, because the marshal was not to receive the debt, but only to detain the defendant in custody until he paid it to the plaintiff. So that it seems to have been considered in that case, that the marshal or sheriff has authority only to detain the defendant in custody until the debt be paid *to the plaintiff*; and if payment can be made to the *plaintiff* alone, it must follow that it is his duty to accept the debt and costs when they are tendered.)

[*30]

It was certainly held, in *Slackford v. Austen*,† that payment of the debt and costs to the sheriff was no discharge, as against the plaintiff; but a defendant taken in execution can only be discharged out of custody by authority of the Court out of which the process issues; for it was the duty of the defendant to have paid the debt and costs before *the writ issued. In *Burmester v. Hilch*‡ the Court refused to permit the defendant to pay into Court the debt and costs, up to a certain day after the action brought (thereby excluding the costs of the declaration delivered) upon the ground of an offer to pay the debt and costs up to that period, without having made a tender before action, or obtaining the common rule for staying proceedings, on payment of debt and costs, up to the time of the application. In *Scheibel v. Fairburn*§ it was held, that an action on the case would not lie against a party suing out a writ of *capias ad respondendum*, if he neglect to countermand it after payment of the debt at least, unless malice be averred. In Com. Dig. tit. Execution, C. 13, it is said, “a man in execution shall not be discharged upon affidavit though there be cause, but ought to have a supersedeas or other matter of record;” and there is no precedent of any such declaration, nor any intimation of any such action having ever been brought with success, nor any authority in any book of practice or of

† 14 East, 468.

§ 1 Bos. & P. 388.

‡ 13 East, 551.

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general law laying it down as the duty of a plaintiff to assist in the discharge of a defendant by any act whatever. In an unreported case of *Locker v. Morrison*, tried in London before Lord Ellenborough, which was an action against a party for refusing to accept the debt and costs, and to give a discharge to the marshal, that learned Judge held that the action would not lie, and nonsuited the plaintiff.

(BAYLEY, J.: How is the defendant in execution to get out of custody ?)

There must be some legal mode, independent of any act of the plaintiff, as in the event of his refusal to authorize the discharge, the party in *custody, supposing the action to lie, might get damages for his detention, but not his liberty, which he was legally entitled to.

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ABBOTT, Ch. J. :

I think there ought not to be any rule in this case. The general question is, whether in a case where the defendant has been taken in execution under a *ca. sa.*, and the whole sum due to the plaintiff has been tendered to him or his attorney, he the plaintiff is bound to receive the money and to sign an authority to the sheriff to discharge the prisoner. Supposing that point to be in favour of the plaintiff, then a question peculiar to this case arises, whether the refusal to discharge was unlawful and malicious. In considering the general question it is important to have regard to the power of taking and detaining a party in execution. It has been decided, in *Slachford v. Austen*, that a sheriff is not bound to receive the money, and that if he does receive it, the payment to him is no discharge of the debt as against the plaintiff. I believe the uniform practice since that decision has been for the sheriff not to receive the debt and costs. It being established that the sheriff has no authority to receive the money and give the prisoner his discharge, the question now arises, whether the plaintiff in the case is bound to accept the debt and costs when tendered to him, and to give authority to the officer of the law to discharge him out of

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custody. If we were to decide that a plaintiff is not bound to accept the debt and costs, the consequence may be, that a party taken in execution at the end of Trinity Term, may remain in prison until Michaelmas Term, unless one of the Judges of the Court in which the action is brought *happens to be in town. According to the habits prevailing a century ago, a Judge was rarely in town during the vacation. But on full and mature consideration I am of opinion that when a debtor offers to a creditor all the money due to him, it is the duty of the creditor in point of law to accept the same in satisfaction of his debt, and to give an authority to the officer in whose custody the debtor is, to allow the debtor to go at large. Then the other question is, whether the refusal to give an authority to the sheriff to discharge the prisoner upon a tender of the debt and costs, was malicious. I think that a party is not to be deprived of his liberty in respect of any other demands than those in respect of which he is detained in the action. The act of the defendants, therefore, in detaining the plaintiff in custody after he had tendered the debt, was wrongful, and must be presumed to have been malicious, in the absence of any circumstance to rebut the presumption of malice.

HOLROYD, J. :

[*33]

When I consider the object and form of the writ of *ca. sa.* and the nature of the authority of the sheriff as to the debt and costs, I think that there cannot be any doubt that a creditor is bound to accept the money due to him on tender made, and to give an authority to the sheriff to discharge the defendant out of custody. By the writ the sheriff is commanded to take the defendant and safely keep him, so that he may have his body in Court to satisfy the plaintiff the debt and costs. The object of the writ is, that the debtor should continue in custody only until the plaintiff is satisfied his debt. That object was answered as soon as the debt and costs were tendered, and the object of *the writ being attained; the defendant ought not to have been continued in custody after he was ready and willing, and offered to pay the debt in the mode required by law. The party who caused him to be detained in custody, after he had so tendered the money,

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was guilty of an unlawful act. Now the plaintiff in the cause was the party who caused the defendant to be detained in custody, after he ought to have been set at large, for it was decided in *Taylor v. Baker*,† and *Slackford v. Austen*,‡ that payment of the debt and costs to the marshal or the sheriff will not operate as a satisfaction to the plaintiff of his debt. If the sheriff, therefore, without the authority of the plaintiff in the cause, had discharged the defendant out of custody, he would not have been justified, for he is not to take the word of the defendant that he has satisfied the debt, or that he has made a tender of it in the mode required by law; and if trusting to his word, the sheriff had discharged him out of custody, and it afterwards turned out that the tender had not been duly made, he would have been liable to an action for an escape, at the suit of the plaintiff. The sheriff, therefore, for his own security, before he discharges a prisoner, is entitled to know from the plaintiff that the debt has been satisfied, or that the defendant has done all that the law requires of him in order to satisfy the debt. But the plaintiff's right to keep the defendant in custody was at an end as soon as the debt and costs had been duly tendered to him. The defendant's detention in custody then became unlawful, and the sheriff not being bound to discharge *the defendant without an authority from the plaintiff, it follows that it was the duty of the latter to give such authority. I think, therefore, that this action is maintainable, and that the verdict was properly found for the plaintiff.

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LITLEDALE, J. :

I think that the plaintiff was bound to accept the debt and costs tendered in satisfaction of his debt; and the refusal to sign the discharge must be considered to have been maliciously done, there being no circumstances in the case to rebut the presumption of malice.

BAYLEY, J. :

I thought at the time of the trial, that a plaintiff having taken a defendant in execution, had no right to force him to incur

† 2 Lev. 203.

‡ 14 East, 468.

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expence and delay in order to obtain his discharge, after the debt and costs had been tendered. It appears from *Taylor v. Baker*, that the marshal, upon payment of the debt and costs to him, has no authority to discharge the prisoner, and in *Stamford v. Davies*,† it was held, that the payment of the debt and costs to the sheriff was not a discharge as against the plaintiff. In Norton's case,‡ it is laid down by the Court, that a defendant is not bound to pay money to the sheriff, but to the party; and it was said that it was sufficient if the money was paid to the plaintiff's attorney upon the record, for that would have been a payment to the plaintiff himself.

Rule refused.

1825.

[35]

THE KING v. AMPHLIT.

(4 Barn. & Cress. 35; S. C. 6 Dowl. & Ry. 125.)

The delivery of a newspaper to the officer at the Stamp Office is a sufficient publication to sustain an indictment for a libel in that paper.

THIS was an indictment against the proprietor of a newspaper for a libel. At the trial before Garrow, B., at the last assizes for the county of Stafford, the only proof of publication was the delivery of a copy of the newspaper containing the libel to the officer at the Stamp Office. It was objected that this was no evidence of an unlawful publication. The learned Judge overruled the objection, and the defendant was found guilty; and now *Campbell* moved for a new trial.

But the Court were clearly of opinion, that this was sufficient evidence of a publication in order to support an indictment, inasmuch as the officer of the Stamp Office would at all events have an opportunity of reading the libel himself.

Rule refused.

† 2 Freem. 482.

‡ 2 Show. 139.

NUTTALL v. STAUNTON.†

(4 Barn. & Cress. 51—57; S. C. 6 Dowl. & Ry. 155; 3 L. J. K. B. 135.)

Where a tenant, by permission of the landlord, remained in possession of part of a farm after the expiration of the tenancy: Held, that the landlord might distrain on that part within six months after the expiration of the tenancy, the 8 Ann c. 14, ss. 6 & 7 not being confined to a tortious holding over or to the holding of the whole farm.

1825.
April 19.

[51]

REPLEVIN for goods taken in certain premises at Staunton Grange, December 30th, 1823. Avowry, that one J. S., for one year and a half next before and ending on the 29th of September, 1823, held and enjoyed a certain farm, of which the premises mentioned in the declaration were part and parcel, as tenant to defendant, at the yearly rent of 500*l.*, payable on the 29th of September and 25th of March, by equal portions; and J. S. continued and was in possession of the said premises in which, &c., from the said 29th of September, 1823, until and at the time when, &c.; and because 150*l.*, parcel of the sum of 250*l.* of the rent aforesaid, for half a year, ending on the 29th of September, 1823, was due and in arrear from J. S. to defendant, (the residue thereof having been paid,) and continued unpaid at the said time when, &c., defendant avowed taking the said goods in the said premises, in which, &c., at the said time when, &c., that being within the space of six calendar months next after the 29th of September, 1823, and during the continuance of the title and interest of defendant in the said premises in which, &c. Second avowry, that J. S., for one year and a half next before and ending on the said 29th of September, and thence until and at the said time when, &c., held the said premises in which, &c., as tenant to defendant, by virtue of a certain demise to him J. S., theretofore made, at the yearly rent of 500*l.*, and because 150*l.*, parcel of 250*l.* of the rent aforesaid, for half a year, ending as aforesaid, on *the 29th of September, and thence until and at the said time when, &c., was due and in arrear from J. S. to defendant, the residue having been paid, defendant avowed taking the goods in the said premises in which, &c., as

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† Cited and applied by LAWRENCE, 516, 519; 64 L. J. Q. B. 178, 181.—
J. in *Wilkinson v. Peel*, '95, 1 Q. B. B. C.

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a distress. Plaintiff pleaded several pleas in bar : on the first three, issues were taken. The fourth, which was to the first avowry, alleged, that after the 29th of September, 1823, and before the said time when, &c., to wit, on, &c., at, &c., defendant, with the leave and licence of J. S., entered into and upon the said farm in the first avowry mentioned, in and upon the possession of J. S., and retook possession thereof ; and the said J. S., from the possession thereof, put out and amoved, and kept him so amoved from thence, until and after the said time when, &c., except as to certain parts, to wit, the premises in which, &c., which defendant suffered and permitted J. S. to occupy for a certain time not elapsed at the said time when, &c. ; without this, that J. S. continued and was in possession of the whole of the said farm, in manner and form as defendant hath in his said first avowry alleged. Fifth plea in bar, that after the 29th of September, 1823, and whilst J. S. was in possession of the said farm, &c., and before the said time when, &c., to wit, on, &c., at, &c., by a memorandum in writing, made between defendant and J. S., and signed by them respectively, it was agreed that J. S. should, from that day, give possession of the Grange farm to defendant, he (defendant) allowing him the use of the orchard, Little Redlands, and home-closes, till the 25th day of March then next, for his own cows or sheep ; that the said J. S. should have the use of the house and stable for his horses, till the said 25th day of March, if convenient to him to do so ; that the said J. S. should plow for defendant such lands as he might direct, paying *him after the rate of 12s. 6d. per acre for such plowing ; that defendant should send such other teams as he might require to plow, and get seed wheat into the ground, and that he should have the use of two rooms for a labourer, to superintend and work on the farm, with permission to enter with servants and workmen, to repair and work on the said farm ; that defendant, in consideration of the above, would forego the next Lady-day rent, and all dilapidations on the buildings, and the land and the fences, as they then were, defendant agreeing to pay all taxes and levies charged or to be charged on the Grange farm, from that day to the 25th day of March then next ; that J. S. should deposit 250*l.*, being his half-year's rent, due

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Michaelmas then last, or secure it to be paid by instalments, when called upon by defendant; that defendant should have the use of the straw that had grown on the said farm in the last Summer, to eat, with his or other cattle, J. S. having permission to turn cows into the straw yard, free of any expence. It was also further agreed, that defendant should receive the Michaelmas rent then due, in the following proportions: viz. 50*l.* November 5th, 1823, 50*l.* November 20th, 1823, 50*l.* December 25th, 1823, 100*l.*, March 20th, 1824; and plaintiff saith, that, in pursuance of the agreement, J. S. afterwards, and long before the said time when, &c., to wit, on 31st October, 1823, at, &c., did give possession of the said farm, being the farm so alleged in the first avowry to have been held as aforesaid, and defendant had and continued to have possession thereof thenceforth, until and after the said time when, &c., save and except, that during the time the said J. S., under and by virtue of the said agreement, had the use of the said orchard, &c., for his *own cow and sheep, and the use of the said house and stable for his horses; and this plaintiff is ready to verify, &c. General demurrer to fourth plea in bar, and joinder. Replication to the fifth plea in bar, after protesting that J. S. did not deposit 250*l.* for the half year's rent due at Michaelmas then last, averred that J. S. did not pay defendant 50*l.*, parcel of the said rent, on the 25th of December, 1823, pursuant to the said agreement, but the same continued in arrear and unpaid, until and at the same time when, &c. Demurrer, assigning for cause that the defendant hath, by his replication, attempted to put in issue an immaterial fact, viz. whether J. S. did pay to defendant the sum of 50*l.*, parcel of the said rent, on the 25th of December, 1823, when such payment, on that day in particular, was not nor is material; and also, that the payment of the said sum of 50*l.* was not nor is a condition precedent. Joinder in demurrer.

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Erskine, in support of the demurrer to the fourth plea in bar, and the replication to the fifth plea:

The question in this case turns on the first avowry. Before the passing of the 8 Ann. c. 14, a landlord could not distrain for rent after the expiration of the tenancy, although the tenant

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held over, and it made no difference whether the holding over was by permission or by wrong. By that statute, s. 6, it was enacted, "that it should be lawful for any person or persons having any rent in arrear, or due upon any lease for life or lives, or for years or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined." The seventh section provides, "that such distress be *made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due." The same privilege is by that enactment given to the landlord, whether the tenant holds over by wrong or by permission, nor does it make any difference if a new tenancy has been created between them; it merely requires that the possession of the tenant should continue. The avowry in this case is in the general form given by the 11 Geo. II. c. 19, and contains all the averments necessary to bring the case within the 8 Ann. c. 14, viz. the possession of the tenant, and that the distress was made within six months after the determination of the tenancy, and during the continuance of the landlord's interest: *Staniford v. Sinclair*.† The fourth plea in bar is bad, because it furnishes no answer to the avowry; for it admits that the tenant remained in possession by permission of the landlord.

(BAYLEY, J.: It may be made a question whether the 8 Ann. c. 14, applies, unless the tenant remains in possession of the whole farm.)

In *Beavan v. Delahay*‡ the tenant was in possession of a part only, and there, as the tenancy continued, the Court held, that the landlord might distrain without the aid of the statute. It is, therefore, immaterial to this case, whether a new tenancy was created or not; and the fifth plea is no answer to the avowry; for after setting out at length the agreement entered into, it omits to state that the rent was paid, or satisfaction made

† 2 Bing. 193.

‡ 2 R. R. 696 (1 H. Bl. 5).

for it, according to the agreement: *Lingham v. Warren*,† *Hudd v. Ravenor*.‡ *It is, therefore, unnecessary to consider the replication.

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Chitty, contra :

The nature of the possession by J. S. at the time of the distress appears from the agreement set out in the fifth plea in bar. It was thereby stipulated that the tenant should give up possession of the farm, which expression denotes the whole matter that he held as tenant. The subsequent occupation by him was merely of a particular part, and for a limited purpose, and not as tenant. The stat. 8 Ann. c. 14 does not apply to such a holding, and at all events ought not to be so construed as to effect any but the immediate tenant: *Ex parte Bennett*.§ Now the present plaintiff is a stranger to the tenancy, and also to the agreement. And this furnishes an objection to the replication to the fifth plea in bar; it alleges, that the instalment due at Christmas, 1823, was not paid, but does not allege that it was not deposited or secured according to the agreement. That fact was in the knowledge of the defendant, but not of the plaintiff. The former, therefore, should have shewn it in pleading.

ABBOTT, Ch. J. :

The fourth plea in bar raises two questions upon the construction of the stat. 8 Ann. c. 14, ss. 6 and 7. First, whether the holding over by the tenant must be tortious; and, secondly, whether it must be of the whole farm. I find nothing in the statute itself confining its operation to cases of a tortious holding over, or to a holding of the whole; and as it appears to have been made for the benefit of landlords, we must not *narrow the construction, there being no plain words making that necessary. The first avowry brings the landlord's right within the statute, and the fourth plea admits that the tenant remained in possession of a part of the premises; it therefore furnishes no answer. The fifth plea is bad for the same reason; for although it sets

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† 2 Brod. & Bing. 36.

§ 2 Str. 787.

‡ 23 R. R. 526 (2 Brod. & Bing. 662).

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out the agreement and avers a performance, by giving up possession, yet it admits that the tenant continued in possession of part of the premises, and does not deny that the part of which possession was so retained, was the place in which the distress was made. The defendant is, therefore, entitled to judgment on both the fourth and fifth pleas in bar.

Judgment for the defendant.

1825.
April 30.

[57]

THE KING v. THE COMPANY OF PROPRIETORS OF THE TRENT AND MERSEY NAVIGATION.†

(4 Barn. & Cress. 57—62; S. C. 6 Dowl. & Ry. 47; 3 L. J. K. B. 140.)

The proprietors of certain lime-stone quarries agreed to deliver to a canal company yearly such quantities of good lime-stone as the canal company should direct, at the rate of 7*d.* per ton, and if they should at any time neglect to deliver the quantities required, it should be lawful to the Company to enter into or upon the lands or lime-stone quarries of any of the proprietors, and to take such quantities of lime-stone as they should think proper, paying 2*d.* per ton. The proprietors of the lime-stone quarries having failed to supply the lime-stone required, the Company entered, and continued for more than twenty years to work the quarries, and take the lime-stone at 2*d.* per ton: Held, however, that the Company had not any exclusive occupation, but a mere privilege, and consequently that they were not liable to be rated to the poor.

THE Company were assessed to the relief of the poor of the parish of Caldon, in the county of Stafford, in the sum of 100*l.*, as occupiers of certain lime-stone quarries in that parish. On appeal, the Sessions confirmed the rate, subject to the opinion of this Court on the following case: By articles of agreement made the 10th of April, 1776, between the Trent and Mersey Navigation Company and T. G. and several other persons, proprietors of the different lime-stone quarries at *or near Caldon, in the county of Stafford, according to their respective estates and interests in the said lime-stone, they, the proprietors, agreed with the Company yearly, and every year for ever thereafter,

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† Cited and applied in *London & North - Western Ry. Co. v. Buckmaster* (Ex. Ch. from Q. B. 1875)

L. R. 10 Q. B. 446; 44 L. J. M. C. 180.—R. C.

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to deliver to the said Company, their successors or assigns, or to such person or persons, and at such time and times as the Company or their clerk should nominate and appoint, such quantities of good and merchantable lime-stone ready got and broke in the pits and quarries where the same should be got, as the said Company or their clerk or agent should yearly direct or appoint, at and after the rate of 7*d.* per ton for every ton of such stone, each ton to consist of twenty-one hundred weight, at 120 lbs. to the hundred (of which quantity notice was to be given before the last day of October in the preceding year); and further, that if they, their heirs or assigns, should at any time thereafter neglect or refuse to deliver such quantities as should be required, it should be lawful for the said Company, their successors and assigns, and such person or persons as they or their clerk or agent should from time to time nominate and appoint, to enter into and upon the lands, grounds, or stone quarries of any of the said proprietors of lime-stone, their heirs, or assigns, and to get, take, and carry away such quantities of lime-stone as they should think proper, out of any of the pits or quarries aforesaid, paying after the rate of 2*d.* per ton, to be computed as aforesaid, for the same (such stone to be got in a regular and proper manner), which said articles of agreement were afterwards confirmed, with additional regulations, by an Act of the 16 Geo. III. c. 32. In pursuance of the said agreement and Act of Parliament, the proprietors of the said quarries of lime-stone did for some years supply the *appellants at 7*d.* per ton, from certain quarries mentioned in the agreement and Act of Parliament; but having subsequently neglected to deliver the quantity of lime-stone required according to the agreement and Act of Parliament, the appellants, in 1795, by virtue of the said agreement, entered into a part of the land containing the lime-stone, called the quarter piece, in the Act of Parliament mentioned, situate in the respondent parish, which said part of the said land was in the occupation of G. Woolstcroft, he being proprietor thereof with R. Woolstcroft. The appellants have got the lime-stone out of thirteen acres of the said part of the land called the quarter piece (the whole containing seventeen acres), and still continue to get the lime-stone out of the

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remainder, paying the proprietors at the rate of 2*d.* per ton, according to the agreement and Act of Parliament. The appellants do not sell or make any profit of any of the said lime-stone within the respondent parish. They merely get the lime-stone out of a quarry, from which it is conveyed along a rail-road made for the purpose by the appellants, to a place called Froghall, situate in the parish of Kingsley, where it is sold to other persons, who burn it into lime. For some time previous to the time of the rate, whilst the appellants were so getting the said lime-stone, the said G. Woolstcroft was in the occupation of the surface of the said part where the appellants were not actually working, and has planted part of the land from which the lime-stone has been got. During such time also the said G. W. has been rated to the relief of the poor of the respondent parish in respect of the said part of the said land called the quarter piece, and has paid 6*l.* as his rate for the same, until January, 1822, when his rate was reduced to 2*l.*, and a *rate of 4*l.* imposed upon the appellants in respect of their assessment for the lime-stone quarries so worked by them under the said agreement and Act of Parliament.

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Campbell and Ryan, in support of the order of Sessions, contended, that upon this statement, the Company must be considered as the occupiers of the lime-stone quarries: *Rex v. All Saints, Derby*.† They are in possession of the immediate profits of the land, and that is sufficient to make them rateable: *Lord Bute v. Grindall*.‡ In *Rowls v. Gell*§ and *Rex v. St. Austell*|| the lord receiving a portion of ore by way of rent, was held rateable for that; and it seems to have been taken for granted that the persons working the mines would be rateable for the residue, were it not for the implied exemption in the statute 43 Eliz. c. 2 in favor of such adventurers. The last two cases also shew that a party may be rateable without having an exclusive occupation.

Scarlett, Nolan, W. E. Taunton, Russell, Balguy, and Caldwell,

† 5 M. & S. 90.

§ Cowp. 451.

‡ 1 R. R. 220 (1 T. R. 338; 2 H. Bl. 265).

|| 24 R. R. 534 (5 B. & Ald. 693).

contra, contended, that the Company had a mere licence to enter and take lime-stone at a certain price, and had no occupation of the quarry to the exclusion of other persons, for that there was nothing in the contract entered into which could prevent the owners of the quarry from getting stone there themselves, or permitting others to do so. In *Rex v. Jolliffe*† the defendant was held not to be rateable in respect of a *rail-road, because he had not the exclusive occupation of the soil; and in *Rex v. Bell*‡ the defendant was held to be rateable for such a rail-road, because in the latter case he had the exclusive occupation. Applying those cases to the present, it is clear that the Navigation Company were not rateable for the lime-stone quarries.

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The Court desired that the case might go down to the Sessions again in order to ascertain whether the Company had been in the exclusive occupation of the quarry. In order to save expence, affidavits were filed, by which it appeared that the owners of the quarry having, in 1796, failed to furnish the Company with the stone required, they entered, and had ever since worked the quarry themselves, paying 2*d.* a ton for the stone gotten. No other person had ever worked or attempted to work stone there except the Company. These affidavits having been commented upon by each side,

ABBOTT, Ch. J. now gave judgment:

This question came before the Court under such peculiar circumstances that it was not likely that any case would be found bearing materially upon it. None such has been discovered; nor is it probable that our decision can form a precedent for any other case. The question is, whether under the contract set out in the case, and that which has taken place under it, the Company were occupiers of the quarry in respect of which they were rated. The contract is, that the owners of the quarry shall supply, at a certain price, as much stone as the Company think fit to *order; and that if they neglect to do so, the Company may enter and work the stone for themselves, paying to the owners a certain sum for every ton so worked.

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† 1 R. R. 437 (2 T. R. 90).

‡ 7 T. R. 598.

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The owners having neglected to supply the stone ordered, the Company many years ago entered, and have ever since worked the quarry for themselves; and, in point of fact, no one else has ever got stone there. But the right of the Company was merely to get there what stone they might think fit; there was nothing in the contract to prevent the owner from giving to others also the privilege of getting stone in the same quarry. The Company therefore had not any sole and exclusive occupation, but a mere privilege, and, consequently, were not liable to be rated to the relief of the poor.

Order of Sessions quashed.

1825.
 May 4.

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THE KING *v.* THE COMPANY OF PROPRIETORS OF THE OXFORD CANAL NAVIGATION.

(4 Barn. & Cress. 74—83: S. C. 6 Dowl. & Ry. 86; 3 L. J. K. B. 168).

By a Canal Act, the proprietors of the Oxford Canal were empowered to take a certain sum per ton per mile upon all goods. By a subsequent Act for making a new canal, reciting that it was apprehended that the making of the intended canal would be injurious to the proprietors of the Oxford Canal, and that it had been agreed that an indemnification should be made to them, as a compensation for such injury, it was enacted that instead of the mileage duty payable to the proprietors of the Oxford Canal, it should be lawful for them to take, "for all coals which should pass from the Oxford Canal into and upon the said intended canal, so much per ton, without any regard to the distance the same should pass along the Oxford Canal; and for all other goods which should pass from any other navigable canal into and upon the Oxford Canal, and from thence into and upon the said intended canal, or from the intended canal into and upon the Oxford Canal, and from thence into and upon any other navigable canal, a certain other sum per ton, without any regard to the distance the same should pass upon the said Oxford Canal": Held, first, that the proprietors of the Oxford Canal were rateable to the poor in respect of their mileage duty in every parish through which the canal passed.

Secondly, that they were liable also to be rated in every parish along which the canal passed for a proportion of the compensation duty.

UPON an appeal against a rate made for the relief of the poor in that part of the parish of Sow situate within the county of the city of Coventry, whereby the Company of Proprietors of the Oxford Canal Navigation were rated as the occupiers of the

towing-path land, and that part of the canal lying within the parish of Sow, and for the tolls and duties arising therefrom, assessed at 1,600*l.*, and the sum for which they were rated was 80*l.*, the Sessions amended the rate by reducing the sum on which the Company was assessed to 1,200*l.*, and the sum assessed to 60*l.*, and confirmed the rate so amended, subject to the opinion of this Court on the following case: The appellants were incorporated by an Act of Parliament of the 9 Geo. III. entitled "An Act for making and maintaining a navigable canal from the *Coventry Canal Navigation to the city of Oxford," and by virtue of the powers given to them by this Act, they purchased and are now the owners of the canal and towing-path in the respondent parish, having no other lands, nor occupying nor possessing any other property therein. By the above Act they are empowered to demand the payment of tonnage and wharfage at a certain rate per mile for all coal, stones, timber, and other goods carried upon or through their canal; and the tonnage commonly taken by them at the time of making the above rate was 1*d.* per ton per mile for coals, and 1*s.* 2*d.* per ton per mile for other sorts of merchandize. This tonnage is usually called the mile tonnage, as distinguished from the compensation tonnage hereinafter spoken of. By a subsequent Act of Parliament of the 33 Geo. III. c. 80, which was an Act for making a new canal to be called the Grand Junction Canal, after reciting that, it was apprehended the making of the intended canal would be injurious to the Company of Proprietors of the Oxford Canal Navigation, and that it was agreed that the compensations thereinafter mentioned should be made to them, as an indemnification against any such injury, it was, amongst other things, enacted, that instead of the tolls, rates, and duties which would have been payable to the Company of Proprietors of the Oxford Canal by virtue of the above-mentioned Act of the 9 Geo. III., and certain other Acts of Parliament for or in respect of the coals, goods, and other things thereinafter mentioned, and made chargeable with certain rates to the said Company, it should be lawful for the said Company of Proprietors of the Oxford Canal Navigation to ask, demand, take, and receive to and for their own proper

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use and behoof, the respective rates thereafter *mentioned; that is to say, “for all coals which should pass from the said Oxford Canal into or upon the said intended canal, the sum of 2s. 9d. per ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same should pass upon the said Oxford Canal; and for all other goods, wares, merchandizes, and things which should pass from any navigable canal into or upon the Oxford Canal, and from thence into or upon the said intended canal; or from the said intended canal into or upon the said Oxford Canal, and from thence into or upon any other navigable canal (except certain articles in the Act specified), the sum of 4s. 4d. per ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same should pass upon the said Oxford Canal.” The Act then provides for the collecting and recovering this last-mentioned tonnage; and also that, in the event thereafter of such tonnage not amounting to certain specified sums within each year, the Company of Proprietors of the intended canal should make good the difference; and it points out the mode of ascertaining and recovering such difference. The tonnage payable to the appellants under this last-mentioned Act is usually called the compensation tonnage. No part of the mile or compensation tonnage is collected in the parish of Sow. The entire length of the Oxford Canal is ninety-one miles. The Grand Junction Canal unites with it at Braunston, and the distance from that place to where it joins the Coventry Canal is thirty-four miles, seven-eighths of which, two miles and one-eighth, are in the respondent parish. This latter canal is the only navigable canal which joins the Oxford in this its northern part, and the proprietors thereof take the tonnage of *coals upon two miles of the Oxford Canal, being the first two miles from the junction thereof with the Coventry Canal at Longford, and the proprietors of the Oxford Canal take the tonnage of all merchandize (except coals) which are carried upon any part of the Oxford Canal, and afterwards upon the Coventry Canal, within three miles and a half from the junction of the two canals at Longford, towards Coventry. For coals which pass along the Oxford Canal, in the respondent parish, the appellants

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receive the mile tonnage, if they do not afterwards enter the Grand Junction Canal; but if they do, then they receive the compensation tonnage only, whether they have passed into the Oxford Canal from any other canal or not. For other sorts of merchandize which pass from the Coventry Canal into the Oxford Canal, and thence into the Grand Junction Canal, or from the Grand Junction Canal into the Oxford Canal, and thence into the Coventry Canal, in both which cases such merchandize must necessarily pass through the parish of Sow, they receive the compensation tonnage; but in all other cases they receive the mile tonnage. The compensation tonnage is never exactly what the mile tonnage would have been. The appellants derive no profit whatever from their land in the parish of Sow, except from the tonnage payable to them by virtue of the above mentioned Acts of Parliament, if any part of that tonnage can legally be considered as such. The occupiers of land in the parish of Sow are rated in the present assessment upon their respective rents, taking those rents as the criterion of the value of the land. The appellants are rated upon the full amount of their tolls, which are calculated to amount to 1,200*l.* per *annum, whereas the same tolls are worth only 1,000*l.* per annum to be rented by a third person.

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The questions for the opinion of the Court were,

First, whether the appellants were liable to be rated for any of their tolls in the parish of Sow. If not, the assessment on the appellants in the parish of Sow was to be struck out of the rate.

Secondly, whether they were liable to be rated in the parish of Sow for part of the compensation tonnage for coals passing out of the Oxford Canal into the Grand Junction Canal, which had passed along the Oxford Canal in the parish of Sow. If they were not, four twenty-fourths of the sum at which they were assessed were to be deducted from the assessment.

Thirdly, whether they were liable to be rated in the parish of Sow for part of the compensation tonnage received in respect of merchandize (not being coals) passing out of any navigable canal into the Oxford Canal, and thence into the Grand Junction Canal, in respect of such part of the said merchandize as had passed along the Oxford Canal in the parish of Sow. If they

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Fourthly, whether they were liable to be rated in the parish of Sow for part of the compensation tonnage received in respect of merchandize (not being coals) passing out of the Grand Junction Canal into the Oxford Canal, and thence into any other navigable canal, in respect of any such part of the said merchandize as had passed along the Oxford Canal in the parish of Sow. If they were not, then five more twenty-fourths were to be deducted from the sum assessed on the appellants.

[79] Fifthly, supposing the appellants to be rateable in respect of the above tolls, or any part of them, in the parish of Sow, whether the sum on which they were assessed in the above rate ought not to be reduced to the amount which such tolls would be worth to be rented by a third person. The several Acts of the 9th, 15th, and 26th Geo. III. for making and maintaining the Oxford Canal; as also the 33 Geo. III. c. 80, called the Grand Junction Canal Act, were to be considered as part of the case.

The *Attorney-General*, *Adams Serjt.*, and *Tindal*, in support of the Order of Sessions :

The Oxford Canal Company were liable to be rated for a certain proportion of their tolls in the parish of Sow.

(*W. E. Taunton* admitted, that after the cases of *Rex v. Milton*,† *Rex v. The Aire and Calder Navigation*,‡ *Rex v. Page*,§ *Rex v. The Proprietors of the Staffordshire and Worcestershire Canal*,|| *Rex v. Trent and Mersey Navigation*,¶ and *Rex v. Palmer*,†† the Company were liable to be so rated.)

They are liable also to be rated in respect of the compensation duty which is granted them by the 33 Geo. III. c. 80, s. 10. By that Act the proprietors are authorized to take, in lieu of the

† 22 R. B. 317 (3 B. & Ald. 112).

‡ 1 R. B. 579 (2 T. R. 660).

§ 2 R. B. 454 (4 T. R. 543).

|| 4 R. B. 683 (8 T. R. 340).

¶ 1 B. & C. 545.

†† 25 R. B. 502 (1 B. & C. 546 ;

2 Dowl. & Ry. 793).

mileage duty to which they were before entitled, the following rates ; first, for all coals which should pass from the Oxford Canal into or upon the said intended canal, the sum of 2s. 9d. per ton, without any regard to the distance which the same should pass upon the Oxford Canal ; and then for all other goods, &c. which should pass from any *navigable canal into or upon the Oxford Canal, and from thence into or upon the said intended canal, or from the said intended canal into or upon the Oxford Canal, and from thence into or upon any other navigable canal (except certain articles in the Act specified), the sum of 4s. 4d. per ton, without any regard to the distance the same should have passed upon the Oxford Canal. Before the passing of this Act the Oxford Canal Company were entitled to take certain tolls in respect of which they would have been rateable in each parish along which the canal passes, and the compensation is granted to them by the latter Act in lieu of the mileage duty, to which they otherwise would have been entitled. Now as the Oxford Canal Company would have been rateable in the parish of Sow in respect of a certain proportion of the mileage duty, they must be rateable in the same proportion of that duty which is given as an equivalent for it. And there is no distinction in principle between coals and any other goods. There was originally a mileage duty. That, for convenience, was changed to a gross sum, and the whole question is, whether that sum is to be subject to the same burden as the former duty. As to the last question put to the Court, it must be admitted that the appellants are rateable for that amount only which such tolls would be worth if let to a third person.

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W. E. Taunton, Holbech, and Goulburn, contrà :

The compensation duty does not necessarily constitute any part of the profits of the land belonging to the Company in the parish of Sow ; it is not, therefore, the subject of rate in that parish, although it may be true that it was substituted in lieu of that which was rateable. It must *be admitted, also, that the Company were rateable in respect of the mileage duty, but now as much duty is paid for passing along a small part as through the whole of the canal. The Company earn nothing in respect

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CANAL CO. of their land in the parish of Sow, because the same compensation duty would be payable to them if the land in the parish of Sow was not passed over.

(BAYLEY, J. : The canal, as a whole, is the cause of the compensation duty, and, therefore, it is earned in respect of the whole line of the canal, and, of course, a proportion of it in respect of that part which is in the parish of Sow.)

The proximate and not the remote cause of the compensation duty is to be considered. Now the proximate cause by which the compensation duty becomes payable, is, that the goods pass into or out of the Oxford Canal; and, therefore, if rateable at all, it ought to be rated in the parish of Braunston, where they are to pass into or out of the canal. Suppose there had been a payment in gross 5,000*l.* in one year, 3,000*l.* in another, 4,000*l.* in another, and 3,000*l.* in another, with respect to any particular place, the Company would not have been rateable in respect of those sums; but if rateable at all they are only rateable in the parish where the compensation duty becomes payable, as in the case of a sluice. In that case the tolls become due for the use of the sluice itself; and the proprietors contribute to the relief of the poor in that parish where the sluice is situate. So in this case, the compensation duty becomes payable, only because the goods pass into or out of the Oxford Canal.

ABBOTT, Ch. J. :

I think that the Oxford Canal Company are rateable in the parish of Sow. We must consider the two Acts as containing one statutable enactment, and the effect of them is this, that for coals passing *along the Oxford Canal, and not going into the Grand Junction Canal, there shall be paid so much per mile per ton, and it is clearly established by *Rex v. Milton*,† that the Proprietors are rateable, as the occupiers of the canal, or land covered with water, for the mileage duty, as profits arising out of that land so used, and in every parish through which the canal passes, in respect of the land there situate and so used for the

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† 22 R. R. 317 (3 B. & Ald. 112).

canal; but as to coals passing into the Grand Junction Canal, instead of a toll per mile, the stat. 33 Geo. III. enacts, that there shall be paid a fixed sum, without regard to distance; but still that fixed sum or compensation duty is earned, in consequence of the goods passing along the Oxford Canal: and part of it must be considered as earned in every parish along the line of that canal. Sow is one of the parishes in respect of which the compensation duty arises, and the Company are rated for that proportion of the whole which is earned in the parish of Sow. It is called a compensation duty, but, in fact, it is a rate given for coals passing along the canal. This being so as to coals, there is no difference as to other goods, except that they must come from some other canal; but that cannot vary the construction of the statute.

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Then, as to the amount, it appears that other lands are rated according to the amount which would be obtained by letting them at a rent, this Company, therefore, must be rated according to the same rules; and, consequently, ought to be assessed in respect of property valued at 1,000*l.*, and the sum at which they are to be assessed must be 50*l.* The order of Sessions must, therefore, be amended.

BAYLEY, J.:

The compensation duty stands upon the *same footing as the mileage duty, and each is liable to be rated. Now the mileage duty is rateable, because it is the profit accruing from land covered with water, and the towing path for each mile over which the goods are conveyed, and the compensation duty, is the profit arising from the land covered with water, and the towing-path through the whole line of the canal, and the Company are rateable for the proportions earned by them in each parish through which the canal passes. The Grand Junction Canal might have occasion to use the Oxford Canal, and they therefore made a bargain to give a compensation to the Oxford Canal Company for going along the whole line from one to the other; that was beneficial to the Oxford Canal. The terms on which the Grand Junction Canal Company are at liberty to use the canal, are 2*s.* 9*d.* per ton for coals, and 4*s.* 4*d.* per ton for other goods.

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It has been said, that the compensation is payable for passing into and out of the Oxford Canal at Braunston, and that it is like the case of a sluice, the proprietors of which are rateable in the parish where the rates are paid. If that were so, I should think the Company were not rateable in Sow; but the fallacy is in the premises, for the compensation is not for passing into or out of the Oxford Canal, but for using it.

HOLROYD and LITLEDALE, JJ. concurred.

The rule drawn up was for amending the rate, by reducing the sum assessed upon the defendants for and in respect of the towing-path land, and that part of the Oxford Canal which lies within the parish of Sow, and the tolls and dues accruing thereupon, to the sum of 1,000l., and by reducing the assessment made thereon to the sum of 50l.

1825.
May 12.

EX PARTE BEECHING AND OTHERS.

(4 Barn. & Cress. 136—137; S. C. 6 Dowl. & Ry. 209.)

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Where a prisoner is brought up under a *habeas corpus* issued at common law, he may controvert the truth of the return by virtue of the 56 Geo. III. c. 100, s. 4.

UPON the return to a writ of *habeas corpus* it appeared that the person making the return had apprehended and detained Beeching and several other persons, under the provisions of the 24 Geo. III. c. 47,† and 45 Geo. III. c. 121,† on a charge of smuggling.

Platt, for the prisoners, tendered affidavits controverting the truth of the facts stated in the return, and contended, that he was entitled to do so, by the 56 Geo. III. c. 100, ss. 3 & 4,‡ this not being a criminal matter. * * *

† Smuggling Acts, since repealed.

‡ The first and second sections of this Act provide for the issuing and

returning of writs of *habeas corpus* by and before any one of the Judges in vacation, in cases other than for

The *Attorney-General*, *Twiss*, and *Maule*, *contrà*, contended, that the return was conclusive.

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BEECHING.
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ABBOTT, Ch. J.:

The object of the Habeas Corpus Act, 31 Car. II. c. 2, was to provide against delays in bringing persons to trial, who were committed for criminal matters. The person making this return is not a person to whom the prisoners have been committed for any such matter. The *habeas corpus* in this case was, therefore, a writ issuing by virtue of the common law; and I think, that under such circumstances the 56 Geo. III. c. 100, s. 4, gives to the prisoners a right to controvert the truth of the return.

Affidavits on both sides were then read, and the merits having been discussed, the prisoners were remanded.

criminal matter or for debt. The third section enacts, "that in all cases provided for by this Act, although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the justice or baron before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return by affidavit or affirmation, and to

do therein as to justice shall appertain."

The fourth section enacts, "that the like proceeding may be had in the Court for controverting the truth of the return to any such writ of *habeas corpus* awarded as aforesaid, although such writ shall be awarded by the Court itself, or be returnable therein."

1825.

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FRAGANO v. LONG.

(4 Barn. & Cress. 219—223; S. C. 6 Dowl. & Ry. 283; 3 L. J. K. B. 177.)

A., resident at Naples, sent an order to M. & Co., hardwaremen at Birmingham, "to dispatch to him certain goods on insurance being effected. Terms, three months' credit from the time of arrival."

M. & Co. (having marked the package with A.'s initials,) dispatched the goods by the canal to Liverpool, and effected an insurance, declaring the interest to be in A. At Liverpool, the goods were delivered by the agent of M. & Co. to the owner of a vessel bound to Naples, through whose negligence they were damaged: Held, that the property in the goods vested in A. as soon as they were dispatched from Birmingham,[†] and that the terms of the order did not make the arrival of the goods at Naples a condition precedent to A.'s liability to pay for them, and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship owner.

ASSUMPSIT against defendant as owner of the brig or vessel *James and Theresa*, for negligence in shipping a cask of hardware. At the trial before Hullock, B., at the Lancaster Summer Assizes, 1824, the following facts appeared in evidence. Mason and Sons, hardwaremen at Birmingham in April, 1822, received an order from the plaintiff residing at Naples, of which the following is a translation, "NAPLES, March 28th, 1822. Order transmitted by G. Fragano, of this city, to Mason and Sons of Birmingham, through Mr. F. L. for the following merchandise, to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival." The order then specified the goods. In pursuance of this order, the cask of hardware in question marked with the plaintiff's initials was sent by the canal from Birmingham, by Mason and Sons, to Messrs. Stokes, their shipping agents at Liverpool, with directions to forward the same to Naples. An insurance was effected, and the interest declared to be in Fragano. On the 3rd of July, Messrs.

[†] The original head-note is here followed, although the judgment of BAYLEY, J. is grounded rather upon the intention of the contract as to the risk, which no doubt generally, though not necessarily, accompanies the property. See similar questions considered in *Castle v. Playford* (1872) L. R. 7 Ex. 98, 41 L. J.

Ex. 44; *Anderson v. Morice* (1875-6) L. R. 10 C. P. 58, 609; 1 App. Cas. 713; 46 L. J. Q. B. 11. As to the distinction between this case and the later decision of the same Court in *Atkinson v. Bell*, 8 B. & C. 277, see Blackburn on Sale, ed. Graham, 130—132.—R.C.

Stokes received a notice of the arrival of the goods from the canal carrier, and sent their porter who received the goods from the *carrier, and took them in a cart to the quay, where the *James and Theresa* was lying, and delivered them on the quay to the mate of that vessel, who gave the following receipt.

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“Received in good order and condition on board the *James and Theresa*, for Naples, one cask of hardware.

“G. F. SAMUEL SMITH, Mate.

“From W. and J. Stokes.”

The goods were left in the custody of the mate, and before they were actually put on board, by some accident the cask fell into the water, by which the injury complained of was sustained. Upon this evidence the jury, under the direction of the learned Judge, found a verdict for the plaintiff. In Michaelmas Term a rule *nisi* for a new trial was obtained, on the ground, first, that no bill of lading having been made out, the property in the goods was never vested in the plaintiff; secondly, that by the terms of the order, the goods were not to be at the plaintiff's risk until after their arrival at Naples.

F. Pollock was now called upon to support the rule :

The plaintiff ought to have been nonsuited in this case, for it did not appear that the property in the goods ever vested in him. The receipt given by the mate of the vessel left the goods in the power of Messrs. Stokes, and he would have been bound to deliver them, according to any order subsequently given by Messrs. Stokes: *Craven v. Ryder*.† But no bill of lading or other document making the goods deliverable to the plaintiff was ever signed; he, therefore, never had such a property *in them as would enable him to maintain this action. Then, secondly, the goods were to be paid for three months after their arrival; if they never arrived the plaintiff could never be called upon for payment; they were not, therefore, at his risk until they arrived at Naples.

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Crompton, *contrà*, was desired by the Court to confine himself to the last point. That was a mere arrangement as to

† 16 R. R. 644 (6 Taunt. 433).

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the time of payment, and could not prevent the vesting of the goods in the plaintiff: *Rugg v. Minett*.† The order for insurance makes it quite clear that the goods were to be at his risk as soon as they left Birmingham.

BAYLEY, J.:

Considering this case apart from the order given by the plaintiff, it is quite free from doubt either in law or justice. It appears, however, that the plaintiff sent an order to Mason and Sons at Birmingham, for the goods in question "to be dispatched on insurance being effected. Terms to be three months' credit from the time of arrival." But for that order the goods never would have left Mason's warehouse, and when sent, they were marked with the plaintiff's initials. If the goods had been destroyed by lightning on the road to Liverpool, Fragano must have borne the loss. At Liverpool, Stokes & Co., Mason's shipping agents, shipped the goods and took a receipt. It is argued that the agent was thereby enabled to maintain an action for the goods, but that Fragano as his principal could not. I think that position is not correct, although there might *have been some difficulty had Stokes & Co. set up an adverse interest. It therefore seems to me, that as the goods left Mason's warehouse by the order of the plaintiff, they were at his risk, and that he can maintain an action for them, unless the form of the order which he gave for them deprives him of that right. It has been urged, that the form of the order throws the risk upon the vendor until the arrival of the goods, for they were not to be paid for until three months from that period, and consequently that the arrival was a condition precedent to Mason's right to sue for the price. If, however, the goods were not to be paid for unless they arrived, why should the plaintiff insure them? That shews that the arrival was not considered as a condition precedent to the payment. If the goods arrived, three months from the arrival was to be the period of credit; if they did not arrive, still the plaintiff would be bound to pay in a reasonable time after the arrival became impossible. If this were not so, the insurance would be alto-

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† 10 R. R. 475 (11 East, 210).

gether nugatory, for Fragano could not sue upon it, neither could Mason, the interest being declared to be in Fragano. For these reasons, I am of opinion that the form of the order for the goods does not vary the case, and that the verdict was properly found for the plaintiff.

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HOLROYD, J.:

I also think that the verdict found for the plaintiff was right. It has been argued that neither the mate nor the owner of the vessel was liable to any one but Stokes & Co., from whom the goods were received. But it is a principle of law, that the real owner of the goods, for whom Stokes & Co. were agents, may sue for the loss, although the defendant was not informed *of his existence. Then it has been urged that Fragano had no interest in the goods, and the terms of the order have been adverted to in support of that argument; but I think that the goods became his property as soon as they were sent off by Mason & Co. When goods are to be delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off. It was next contended that Fragano was not liable to the vendor unless the goods arrived; but the order for insurance is decisive as to that. The policy was to protect Fragano, and shews that he considered he should be the sufferer if the goods were lost on the voyage, which he could not have been had the arrival of the goods been a condition precedent to his liability to the vendors. The expiration of three months was to be the time of payment if the goods arrived; if they did not arrive the law would imply a promise to pay in a reasonable time.

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LITTLEDAL, J. concurred.

Rule discharged.

1825.

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GREEN, EXECUTRIX OF DANIEL BOAZ, DECEASED, v.
DAVIES.†

(4 Barn. & Cress. 235—243; S. C. 6 Dowl. & Ry. 306; 3 L. J. K. B. 185;
S. C. at Nisi Prius, 1 Carr. & P. 451.)

An instrument in the following form: "Received of A. B. 100*l.*, which I promise to pay on demand, with lawful interest," is a promissory note.†

In assumpsit by an executrix on a promissory note for 100*l.*, made in 1814, and payable to her testator, and for money had, &c., it appeared on the production of the note that it had a three-penny receipt stamp and a one pound agreement stamp, and there was indorsed upon it a receipt for a penalty of 5*l.* and 1*l.* duty. The proper stamp for such a note in 1814 was a three shilling stamp: Held, that as it appeared upon the face of the note that it had been issued without having affixed to it a stamp equal in amount to that required by law, the commissioners had no power after it had been issued to affix to it another stamp, and, therefore, that it was not receivable in evidence, either in support of the count for the promissory note or of the money counts.

The defendant, on being applied to by the plaintiff for payment of interest, stated that he would bring her some on the following Sunday: Held, that although this was an admission that something was due, still as it did not appear what the nature of the debt was, or that it was due to the plaintiff as executrix or in her own right, or that it was one for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages, and a nonsuit was entered.

ASSUMPSIT on a promissory note for 100*l.*, dated the 23rd of December, 1814, payable to Daniel Boaz, with lawful interest. Pleas, general issue, and the Statute of Limitations. At the trial before PARK, J., at the Summer Assizes for the county of Stafford, 1824, the plaintiff produced in evidence the following instrument: "December 2nd, 1814. Received of Mr. Boaz 100*l.*, which I promise to pay, with lawful interest," and proved the hand-writing of the defendant to it. The note had upon it a three-penny receipt stamp, and a 1*l.* agreement stamp, and on the back of it there was a receipt for the penalty of 5*l.* and the 1*l.* duty. It was further proved that about two months before the trial, application was made to the defendant on the part of the plaintiff to send her a little interest of her money, to which the defendant replied, "he was thinking about the old lady and

† Followed by KEKEWICH, J. in a case under the Stamp Act of 1870, L. J. Ch. 306.—R. C.

Ashling v. Boon, '91, 1 Ch. 568; 60 ss. 33, 37. † See now The Stamp Act, 1891,

that she would be wanting some, and that on the Sunday he would bring her some interest of her money." It was proved that no interest had ever been paid. It was objected, on the part of the defendant, that *the note was not receivable in evidence, because it had not a three shilling stamp as required for a promissory note of this description by the 48 Geo. III. c. 149, which was the Stamp Act in force at the time when the note was made. The learned Judge reserved the point, and the plaintiff had a verdict for the amount of the note and interest, with liberty for the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose in last Michaelmas Term,

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Russell and Whately on a former day during these sittings shewed cause :

The instrument in question is not a promissory note, inasmuch as no payee is named in it. It is a writing containing an acknowledgment of a debt, and, therefore, receivable in evidence without a stamp: *Israel v. Israel*,† *Fisher v. Leslie*.‡ It is a mere accountable receipt like the instrument in *Rowcroft v. Lomas*.§ But, secondly, assuming it to be a promissory note, there was a sufficient stamp upon the note at the time when it was produced in evidence, and that was sufficient. *Firbank v. Bell*,|| *Butts v. Swann*,¶ and *Rowcroft v. Lomas* will be relied on to shew that this instrument does not amount to an agreement. But that is immaterial, for by the 55 Geo. III. c. 184, s. 10,†† it is enacted, "that all instruments for or upon which any stamp or stamps shall have been used of an improper denomination or rate of duty, but of equal or greater value in the whole with or than the stamp or stamps which ought regularly to have been used thereon shall nevertheless be deemed valid and effectual in the law; except in cases where the stamp or *stamps used on such instruments shall have been specially appropriated to any other instrument, by having its name on the face thereof." Now this clause is retrospective as well as prospective, for the

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† 10 B. R. 737 (1 Camp. 499).

‡ 1 Esp. 426.

§ 4 M. & S. 457.

|| 1 B. & Ald. 36.

¶ 2 Brod. & Bing. 78.

†† Repealed 33 & 34 Vict. c. 99.

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words are, "shall have been used." Then the only question is, when an instrument is produced in evidence, whether the stamp affixed to it at that time be of greater value than that required by law ?

(BAYLEY, J. : Upon the face of the note it appears to have had a three-penny receipt stamp in the first instance, and there is indorsed on the back of it a receipt for a penalty of 5*l.*, and the 1*l.* duty for the agreement stamp. It appears, therefore, that the bill was issued with an improper stamp on it, and having been so issued, had the commissioners any power to affix another stamp ?)

There was not any proof as to the time when the stamp was affixed. Besides *Wright v. Riley*† is an authority to shew that the Court will not enquire when an instrument was stamped, provided it has the proper stamp affixed to it when produced in evidence.

Taunton, contra :

The instrument in question was a promissory note, and having been made in 1814, ought, before it was issued, to have had affixed to it a three shilling stamp as required by the 48 Geo. III. c. 149, sched. part 1, for a promissory note of this amount. *Chadwick v. Allen*‡ is expressly in point to shew that it is a promissory note, and if it be so, then the commissioners had no power to restamp it after it had been once issued with a stamp of less value than that required by law. That appears clearly by reference to the several *Stamp Acts. The 31 Geo. III. c. 25, s. 19, directs the commissioners to stamp the paper before the thing charged is written thereon, and not after. The 37 Geo. III. c. 136, s. 5, authorizes them to stamp notes after they are written, provided they are written upon stamps of a *proper* amount but of wrong denomination. By the 48 Geo. III. c. 149, s. 8, the powers and provisions of former Acts as to the duties were to be put in execution as to the duties by that Act imposed, and by section 11 the issuing a note unless duly stamped,

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† 1 Peake, 230.

‡ 2 Str. 706.

subjected the party to a penalty of 50*l.*; and this latter Act was in force at the time when the instrument in question was made; and it appears by the indorsement, that it was issued with a stamp of a less amount than that required by law. The commissioners, therefore, had no power to affix any other stamp. The 55 Geo. III. c. 184, s. 10, does not apply, because it was not in force at the time when the instrument was issued. In *Butts v. Swann*,† the instrument was an order for payment of money, which, in the Stamp Acts, are put on the same footing as bills or notes. It had no stamp upon it when it was written, but it was stamped with a 1*l.* agreement stamp at the time when it was produced at the trial, and that was held to be insufficient.

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Cur. adv. vult.

The judgment of the COURT was now delivered by

BAYLEY, J. :

This was an action upon a note, and the question was upon the sufficiency of the stamp. The note was in this form: "December, 1814. Received of Mr. D. Boaz, 100*l.* which I promise to pay on demand, with lawful interest." It was upon a three-penny receipt *stamp and a 1*l.* stamp. It was urged first, that this was not a note, no payee being named, and if not, that no stamp was necessary. Secondly, that these stamps were sufficient. Thirdly, that the instrument might be read as evidence of an account stated. Fourthly, that the promise proved against defendant that he would bring plaintiff some interest, was an admission that something was due, and would entitle plaintiff to a verdict for at least nominal damages.

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As to the first point, of that there can be no doubt; no particular form of words is necessary to constitute a note, and *Chadwick v. Allen*‡ is in point to shew that it is not necessary to name the payee more explicitly than this note does; the substance of the note there was, 15*l.* 5*s.* balance due to Sir Andrew Chadwick, I am still indebted, and do promise to pay." Whom he was to pay was not in terms stated, but as no other payee was named, who but Sir A. Chadwick could be the object

† 2 Brod. & Bing. 78.

‡ 2 Str. 706.

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of his promise? So here, as the money was received from Boaz, he alone could be the person to whom the money was to be paid back.

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Then as to the sufficiency of the stamp, as this note was dated Dec. 1814, it is to be considered with reference to the Acts then in force and to such subsequent Acts, if any, as are applicable to it. The Act then in force was the 48 Geo. III. c. 149, and upon such a note the stamp under that Act would have been a 3s. stamp. The issuing such a note, unless the same was first duly stamped, subjected the party under section 11 to a penalty of 50*l*. By section 8 the powers and provisions of former Acts as to former duties, were to be put in execution as to the duties by that Act imposed. One of the provisions as to former duties, was imposed *by the 31 Geo. III. c. 25, s. 19. That provision was, that the commissioners should stamp the paper before the thing charged; i.e., the note, &c., should be written thereon, that no note should be given in evidence, or admitted to be good, useful, or available in law or equity, unless the paper on which it was written, was marked with a stamp denoting the duty or some higher rate or duty in that Act contained; and that it should not be lawful for the commissioners to stamp any paper with any stamp directed by that Act, after such note was written thereon. This provision was so far altered by the 37 Geo. III. c. 136, s. 5, as to warrant the stamping notes after they were written; if they were written upon stamps of a proper amount, but of wrong denomination, but not otherwise, and subject to that alteration, it was in force at the time when this note was given. This note, therefore, was originally upon a wrong stamp, and no stamp, as the law then stood, could lawfully be put upon it. The 1*l*. stamp now impressed upon it would not have been available (see 43 Geo. III. c. 127, s. 6; *Farr v. Price*, 1 East, 55; † *Taylor v. Hague*, 2 East, 414; and *Chamberlain v. Porter*, 1 Bos. & P. (N. R.) 30), and it remains to be seen whether any alteration in the law has since been made, which will remove the objection. The only statute which has made any alteration is the 55 Geo. III. c. 184, and the only provision in that Act which bears upon the question, is section 10, which enacts, that where stamps had been used of an

† 5 R. R. 515.

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improper denomination or rate of duty, but of sufficient amount, the instrument should be deemed valid and effectual, unless the stamp used were specially appropriated to some other instrument, by having its name on the face thereof. It was urged upon the argument, that this clause was retrospective as well as prospective; *that it would apply to instruments made prior to that Act, as well as to instruments made since, and that so as the instrument had a stamp upon it at the time it was produced upon the trial, an inquiry as to when it was put on was inadmissible; and that as this instrument had upon it at the time it was produced a 1*l.* stamp, which had no name upon the face of it, it was within the operation and protection of this clause. Whether the clause in the 55 Geo. III. be retrospective as well as prospective, it is not necessary now to decide, because we are of opinion that an inquiry as to the time when the stamp was put on is admissible, and that as this note carries upon it a minute as to the time when the 1*l.* stamp was imposed, and was produced by the plaintiff with that minute upon it, at the time of the trial, we are bound to consider it as a note which had not a stamp of sufficient amount at the time it was issued; and that under the prohibition in the 31 Geo. III. the 1*l.* stamp was improperly added, and does not remove the objection on account of the original want of stamp. The case of *Butts v. Swann*[†] is an authority upon this point. There the instrument was an order for payment of money, which is put by the Stamp Acts upon the same footing in this respect as bills or notes. It had no stamp upon it when it was written, but it was stamped with a 1*l.* agreement stamp at the time of the trial. It may be inferred from the case, though it is not distinctly stated, that the stamp was not specially appropriated to agreements, because if it had there could have been no argument upon that point; *and the Court decided that as the instrument had not the proper stamp upon it when it was written, the subsequent addition of a stamp could not make it valid. DALLAS, Ch. J. said, it is admitted that if this instrument constituted a bill of exchange it could not be stamped after it was first issued, and RICHARDSON, J. refers to the 31 Geo. III. to establish that point. The case before Lord Kenyon of

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† 2 Brod. & Bing. 78.

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Wright v. Riley[†] is quite different. There, though the bill was stamped after it was drawn, which was improper, it was stamped with a regular bill stamp. There was nothing upon the face of the bill to shew that it had not had that stamp upon it at the time it was issued, and the bill was a negotiable bill, and in the hands of an indorsee, and there was nothing to shew that the plaintiff took it before it was stamped. We therefore feel ourselves bound, though reluctantly, to say that the stamps in this case were not sufficient; and if not, it follows as a consequence upon the third point, that the note could not be received as evidence of an account stated. The statute 31 Geo. III. provides explicitly, that no note shall be given in evidence or available in law or equity unless the paper on which it is written is duly stamped; and to allow it as proof of an account stated would be to admit it in evidence, and make it available upon the last question. It was conceded by *Mr. Taunton*, and is indisputable, that what the defendant said as to interest was an acknowledgment that there was some debt in existence, but what was the nature of that debt, whether it was due to the plaintiff in her character of executrix of Boaz or in her own right, and whether it was one for which assumpsit *would lie, are questions upon which we are left entirely in the dark; and under those circumstances we do not see how we can say that the plaintiff is entitled to a verdict even for nominal damages. We feel ourselves therefore compelled to say that the rule for a nonsuit must be made absolute.

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Rule absolute.

† 1 Peake, 230.

DENN ON THE DEMISE OF MANIFOLD *v.* DIAMOND.†

1825.

(4 Barn. & Cress. 243—247; S. C. 6 Dowl. & Ry. 328; 3 L. J. K. B. 211.)

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Where a father, seised in fee of an estate, conveyed it to his son by a deed which recited that he (the father) was minded, and had resolved to give and assure it to his son, as well in consideration of natural love and affection, as also in consideration of the provision which the son had that day made (by his bond) of 1,500*l.* in augmentation of the portions or fortunes of his sisters: Held, that this was not a *sale* to the son within the meaning of the 48 Geo. III. c. 149,† schedule tit. Conveyance, and that the conveyance was not subject to the *ad valorem* stamp duty.

EJECTMENT for premises in the county of Chester. At the trial before Warren, Ch. J. of Chester, at the last Summer Assizes for that county, it appeared that the lessor of the plaintiff claimed under one W. Barnes, whose title depended upon a conveyance from his father T. Barnes. That deed recited that “T. Barnes being seised of the premises in fee was minded, and had resolved to give and assure the same to W. Barnes, as well in consideration of the natural love and affection which he entertained for W. Barnes, as also in consideration of the provision which W. Barnes had that day made (by his bond or obligation in writing) of 1,500*l.* in augmentation of the portions or fortunes of his eight sisters;” and then proceeded to convey the premises to W. B. in fee. This deed had not any *ad valorem* stamp, whereupon it was objected, for the defendant, that it could not be received in evidence, and that the plaintiff must be nonsuited. The learned Judge overruled the objection, *and the plaintiff obtained a verdict, the defendant having leave to move to enter a nonsuit. A rule *nisi* for that purpose was obtained in Michaelmas Term, and now

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D. F. Jones shewed cause :

This question turns upon the construction of the 48 Geo. III. c. 149. In the sched. pt. 1 an *ad valorem* duty is required to be paid for the conveyance *upon the sale* of any lands; but in the

† Compare the case of *Huntingdon v. Commissioners of Inland Revenue* decided by WRIGHT, J. and KENNEDY, J. (’96, 1 Q. B. 422; 65 L. J. Q. B. D. 297) under the definition of “conveyance on sale” in s. 54 of the Stamp Act, 1891.—R. C.

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present case there was no sale of the lands within the meaning of that statute. It was nothing more than a mode of dividing the father's property amongst his children. That the duty does not attach unless there is a sale of the lands properly so called, is plain from this that no *ad valorem* duty is payable upon the exchange of lands, although one party may give a sum of money in addition to his lands. But supposing this to be otherwise, still all the duty required by law has actually been paid. The only proof of pecuniary consideration was the recital of the bond. If the bond was a valid security it had an *ad valorem* stamp, if it had not such a stamp it was invalid, and then there was no pecuniary consideration for the conveyance.

Temple and Parke, contra :

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The statute requires that the stamp should be upon the principal instrument whereby the lands are granted, and therefore the stamp on the bond would not suffice, even if it were of the same value as that imposed on the conveyance. But it is not of the same value, the duty on a bond for 1,500*l.* being 4*l.*, and on a conveyance where the purchase-money is 1,500*l.* the *ad valorem* duty is 10*l.* It must be admitted that the duty is only required where there is a sale of the lands. But this was a grant partly for *natural love and affection, and partly for a money consideration. It is not necessary in order to constitute a sale that the money should be paid to the grantor; it is sufficient if it be paid by the grantee.

(HOLROYD, J.: The gift of an estate by a father to all his children would clearly be voluntary; then suppose it be given to a son upon trust to divide it amongst all his father's children, or upon trust to pay an annual sum out of it, still that would be a voluntary grant of the estate, subject to a rent-charge. How then can the case be altered by the payment of a gross sum instead of an annuity?)

A person may certainly grant his estate without coming within the statute, but where he converts the realty into money he is within it. If the estate had been conveyed, subject to a charge

of 1,500*l.*, then the estate only would have been liable ; but here the person of the grantee was rendered liable by the giving of a bond. This falls within the provision in the 48 Geo. III. c. 148, sched. pt. 1, title Conveyance, “that where any lands or other property shall be sold and conveyed subject to any mortgage, bond, or other debt, or to any gross or entire sum of money to be afterwards paid by the purchaser, such debt or sum of money shall be deemed part of the consideration in respect whereof the said *ad valorem* duty is to be paid.”

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BAYLEY, J. :

It is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language. Here the duty is imposed upon the *sale* of lands. Was the transaction in question a *sale* of lands within the meaning of the Legislature? In common parlance, a seller disposes of his lands at an adequate price, which the purchaser pays. It appears to me that the present transaction was nothing more *than a family arrangement, and it does not necessarily follow from any thing that appears in the case, that there was any essential connection between the giving of the bond and the conveyance of the estate. The deed does not import that the conveyance was made in consideration of money that the son would pay as part of the transaction ; nor is it mentioned in the deed that the son had bargained to give the bond as a consideration. But I rely principally upon this, that the transaction is not to be considered as a *sale*. I cannot agree to the position, that wherever money is paid there is a sale. A father may give his estate to be divided amongst his children, leaving the mode of division to be arranged by them. Suppose a father were to give an estate to his son, stipulating at the same time that he should provide for his sisters, and the son were to agree to give them, and actually gave them, 10,000*l.*, surely that would not make it a *sale* of the estate by the father to the son. For these reasons, I think that the *ad valorem* stamp duty imposed on the *sale* of lands was not necessary in this case, and, consequently, that the deed having been properly received in evidence, this rule must be discharged.

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Upon the true construction of this and all similar statutes, I am of opinion that the transaction in question was not a sale of lands within the meaning of the Legislature. A sale imports a *quid pro quo*, in some way or other enuring to the benefit of the party selling. Here no benefit accrued to the father, it was altogether a gift to the son for the benefit of himself and the other members of his family. The father had no compensation, so considered in point of law. It is admitted that no duty would attach if the whole estate *were divided amongst the different members of the family; if, then, any one receives money in lieu of his share of the estate, can that make it a sale within the meaning of the statute? It is true, that the son paying money for the estate may, in some sort, be considered a purchaser, but that does not make the father a seller; and to bring the case within the statute, I think there must be a *sale* as to both. I agree, therefore, that this rule must be discharged.

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Rule discharged.†

† Littledale, J. was absent.

BROMAGE AND ANOTHER v. PROSSER.†

(4 Barn. & Cress. 247—258; S. C. 6 Dowl. & Ry. 296; 3 L. J. K. B. 203;
S. C. at Nisi Prius, 1 Carr. & P. 475.)

1825.

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In an action for words spoken of the plaintiffs in their trade as bankers, it was proved that A. B. met the defendant and said, "I hear that you say that the plaintiffs' bank at M. has stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at C., and nobody would take their bills, and I came to town in consequence of it myself." It was proved that C. D. told the defendant that there was a run upon the plaintiffs' bank at M. Upon this evidence, the learned Judge, after observing that the defendant did not appear to have been actuated by any ill will against the plaintiffs, directed the jury to find their verdict for the defendant if they thought the words were not maliciously spoken:

Held, upon motion for a new trial, that although malice was the gist of the action for slander, there were two sorts of malice, malice in fact and malice in law; the former denoting an act done from ill will towards an individual; the latter a wrongful act intentionally done, without just cause or excuse; and that in ordinary actions for slander, malice in law was to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but in actions for slander, *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved: Held, therefore, in this case, that the Judge ought first to have left it as a question for the jury, whether the defendant understood A. B. as asking for information, and whether he had uttered the words merely by way of honest advice to A. B. to regulate his conduct, and if they were of that opinion, then, secondly, whether in so doing he was guilty of any malice in fact.

THIS was an action for words spoken of the plaintiffs in their trade and business as bankers at Monmouth. The declaration stated that the plaintiffs carried on the trade and business of bankers in partnership at Monmouth and Brecon, and had always conducted themselves *with credit and punctuality towards their creditors and customers; and until the speaking of the words, &c., had never been suspected of being guilty of any act of insolvency, or of having stopped or made default in payment of the monies due or owing from them in their said trade and

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† The judgment of BAYLEY, J. in this case has been frequently cited in later cases, of which it will be sufficient to refer to *Capital and Counties Bank v. Henty* (H. L. 1882) 7 App. Cas. 767; 52 L. J. Q. B. 232; and *Mogul S.S. Co. v. McGregor*

(1888-1892) 21 Q. B. D. 544; 23 Q. B. D. 598; '92, A. C. 25; 57 L. J. Q. B. 541; 58 L. J. Q. B. 465; 61 L. J. Q. B. 295; *Nevill v. Fine Arts, &c., Co.*, '95, 2 Q. B. 156; 64 L. J. Q. B. 681, 684; '97, A. C. 68. —R. C.

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business, but were in good credit and gaining great profits, yet defendant contriving, &c., spoke the following words: "The bank of Bromage and Snead (the plaintiffs) at Monmouth is stopped." The second count stated, that in a discourse which the defendant had with one L. Watkins in the presence and hearing of other subjects of the realm, of and concerning the plaintiffs in the way of their trade and business, and of and concerning the said bank of the plaintiffs at Monmouth, he, the defendant, further contriving and intending as aforesaid, in the presence and hearing of the said L. Watkins and the said last-mentioned subjects, and in answer to a certain question and observation put and made by the said L. Watkins to the defendant as to the said plaintiffs in their said trade and business, and as to the said defendant having said that the bank of the plaintiffs at Monmouth was stopped, falsely and maliciously spoke and published of and concerning the said plaintiffs, in the way of their aforesaid trade and business, and of and concerning the bank of the plaintiffs at Monmouth aforesaid, the words following: "Yes, it is. I was told so," thereby meaning that the plaintiffs had stopped and made default in the payment of the monies due and owing from them in their said trade and business of bankers at Monmouth aforesaid. The third count stated, that in answer to a question and observation put and made by Watkins to defendant as to the plaintiffs in their trade and business, and as to their bank at Monmouth *aforesaid being stopped, defendant spoke the words, "Yes, it is." Plea, not guilty. At the trial before Park, J. at the Summer Assizes for Monmouth, 1824, it appeared that Watkins, on the 13th of January, 1824, met the defendant in Brecon, and addressing him, said, "I hear that you say the bank of Bromage and Snead at Monmouth has stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at Crickhowell, and nobody would take their bills, and I came to town in consequence of it myself." Watkins then said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it. Defendant repeated, "I was told so." It was proved on the part of the defendant that one George Brown, to whom the defendant had paid two one pound notes issued by the plaintiffs, told the

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defendant on the 12th of January, that there was a run upon the plaintiffs' bank, and that if there was anything in it, he must take the notes back; and that he, Brown, afterwards returned the notes to the defendant on that ground; but he never told the defendant that the bank had stopped, or that nobody would take their bills. The learned Judge told the jury, that malice was the gist of the action; that it did not appear from the evidence that the defendant was actuated by any ill will against the plaintiffs; and that if the words were not spoken maliciously, the defendant was not answerable; that they ought therefore to find their verdict for the defendant if they thought that the words were not spoken maliciously, otherwise for the plaintiffs. The jury found a verdict for the defendant. A rule *nisi* for a new trial was obtained in last Michaelmas Term by *Campbell*, on the ground that the learned Judge had improperly left to the jury the question of malice, for it was to be inferred in this case from the act of the defendant, inasmuch as the occasion did not justify the speaking of the words.

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W. E. Taunton and *Maule* shewed cause :

The question of malice was properly left to the jury. In *Hewer v. Dawson*,† which was an action for saying of the plaintiff, a tradesman, "He cannot stand it long, he will be a bankrupt soon," it was proved by a witness that the words were not spoken maliciously, but by way of warning; and PRATT, Ch. J. directed the jury, "that though the words were otherwise actionable, yet if they should be of opinion that the words were not spoken out of malice, but in the manner before mentioned, they ought to find the defendant not guilty," and they did so accordingly. So in *Rogers v. Clifton*,‡ Lord ALVANLEY says, "I think I should grievously have invaded the province of a jury if I had not left it to them to say whether, considering all the circumstances of the case, the conduct of the defendant was not malicious."

(BAYLEY, J. : Under certain circumstances, words which would otherwise be actionable, are *primâ facie* excusable by the occasion; those, however, are excepted cases.)

† Bull. N. P. 8.

‡ 3 Bos. & P. at p. 592.

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All those cases come within this rule that the circumstances negative malice. The occasion may alter the burthen of proof, but still the malice is a question for the jury. If malice is to be presumed, the presumption is to go to the jury as proof, therefore, *quacunqve via*, the question must be decided by them. It cannot be disputed that the evidence given by the defendant tended to negative malice. But even if that were doubtful, the *plaintiffs would not be entitled to a new trial. Upon the first count it is clear that the verdict was properly found for the defendant, for there was no evidence to support it, the words there set out amount to a positive statement by the defendant that "the bank of Bromage and Snead at Monmouth had stopped;" the evidence was that, in answer to questions whether defendant had said so, and whether it was true, the defendant said it was, and that he was told so, and that it was so reported at Crickhowell. Now these words do not amount to a charge that the bank had stopped; there is a material variance between the allegation and the proof. The second count is quite new in form; and it alleges that, in answer to a question put by Watkins to defendant as to the plaintiffs in their trade and business, and as to the defendant having said that the bank of the plaintiffs at Monmouth had stopped, the defendant spoke of and concerning the plaintiffs in the way of their trade and business, and of and concerning the bank of the plaintiffs at Monmouth, the words, "Yes, it is; I was told so." It is not averred that the answer had reference to the assertion that the bank had stopped. If a verdict had been found for the plaintiffs on that count, no judgment could have been given. The third count is equally objectionable. It is quite ambiguous whether the defendant meant to say that he had used certain words or that those words were true. The record is therefore defective: *Garford v. Clark*;† and on that ground the Court will not grant a new trial.

Campbell and G. R. Cross, contra :

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The words spoken by the defendant were in themselves clearly actionable, *and the plaintiff is entitled to a new trial, unless it

† Cro. Eliz. 857.

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is to be decided that in all cases of slander, without reference to the occasion or circumstances of uttering it, malice is a question for the jury. It has hitherto been understood that when slanderous words are spoken, without any privilege for the communication, the law infers malice from the probable result, viz., the injury to the defendant. The cases cited on the other side were instances of privileged communications, and totally different from the present. Suppose this defendant to have said that the plaintiff stole a horse, it would be no answer to say that he had heard so, and believed it to be true; no question of malice could, under such circumstances, be left to the jury. A plea stating such facts would be clearly insufficient; the evidence must be likewise insufficient when given under the general issue. Now, in this respect, there is no difference between words imputing felony and insolvency. Even if the words had been spoken to the defendant under circumstances which justified them, yet a faithful repetition of them would not be justified unless the author were named: *Davis v. Lewis*.† Here there was not a faithful repetition of what the defendant heard; he was told there was a run upon the bank, and he reported that it had stopped. Then, as to the sufficiency of the evidence, there certainly was evidence to support the first count.

(LITLEDALE, J.: In an action for words you cannot out of a question and answer make an affirmative proposition. You must state the question and answer.)

Still the evidence may be taken as an admission by the defendant that he said so and so on a former day; and evidence *of an admission of having spoken certain words is sufficient to support a declaration charging those words. To the second and third counts no objection was made at the trial, and the words were proved as laid.

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(BAYLEY, J.: Does the question, "Is it true?" mean, "Is it true that you said so and so?" or, "Is it true that the bank has stopped?")

† 4 R. R. 373 (7 T. R. 17).

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That being equivocal, was a question for the jury. If the defendant by answering, "Yes, it is," meant that he had used the words, the second count was proved; if he meant that the bank had stopped, the third count was proved; and, in either case, the plaintiff was entitled to a verdict.

Cur. adv. vult.

BAYLEY, J. now delivered the judgment of the Court :

This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was, that in answer to a question from one Lewis Watkins, whether he, the defendant, had said that the plaintiffs' bank had stopped, the defendant's answer was, "it was true, he had been told so." The evidence was, that Watkins met defendant and said, "I hear that you say the bank of Bromage and Snead, at Monmouth, has stopped. Is it true?" Defendant said, "Yes, it is; I was told so." He added, "It was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Defendant repeated, "I was told so." Defendant had been told at Crickhowell there was a run upon plaintiffs' bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond what he had heard. The learned Judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but as the defendant did not appear to be actuated by any ill will against the plaintiffs, he told the jury that if they thought the words were not spoken *maliciously*, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken *maliciously*, they should find for the plaintiffs: and the jury having found for the defendant, the question upon a motion for a new trial was upon the propriety of this direction. If, in an ordinary case of slander, (not a case of privileged communication), want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law *implies* such malice as is necessary to maintain the action, it

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is the duty of the Judge to withdraw the question of malice from the consideration of the jury: and it appears to us that the direction in this case was wrong. That *malice*, in some sense, is the gist of the action, and that therefore the manner and occasion of speaking the words is admissible in evidence to shew they were not spoken *with malice*, is said to have been agreed (either by all the Judges, or at least by the four who thought the truth might be given in evidence on the general issue) in *Smith v. Richardson*;† and it is laid down in 1 Com. Dig. Action upon the Case for Defamation, G. 5, that the declaration must shew a malicious intent in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action, but in what *sense the word “malice” or “malicious intent” are here to be understood, whether in the popular sense, or in the sense the law puts upon those expressions, none of these authorities state. Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally*, and without just cause or excuse. If I maim cattle, without knowing whose they are, if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it *of malice*, because it is intentional, and without just cause or excuse.‡ And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words it is sufficient to charge that the defendant spoke them *falsely*; it is not

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† Willes, 24.

‡ Russell on Crimes, 614, N. 1.

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necessary to state that they were spoken *maliciously*.† This is so laid down in Styles 392, and was adjudged upon error in *Mercer v. Sparks*.‡ The objection there was, that the words were not charged to have been spoken maliciously, but the Court answered, *that the words were themselves malicious and slanderous, and, therefore, the judgment was affirmed. But in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmonson v. Stevenson*,§ Lord MANSFIELD takes the distinction between these and ordinary actions of slander. In *Weatherston v. Hawkins*,|| where a master who had given a servant a character, which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded him; *Wood*, who argued for the plaintiff, insisted that this case did not differ from the case of common libels, that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is sufficient to prove publication; the motives of the party publishing are never gone into, and that the same doctrine held in actions for words, no express malice need be proved. Lord MANSFIELD said the general rules are laid down as *Mr. Wood* has stated, but to every libel there may be an implied justification from the occasion. So as to the words; instead of the plaintiff's shewing it to be false and malicious, it appears to be incidental to the application by the intended master for the character; and BULLER, J. said, this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "malicious" as well as *false. BULLER, J. repeats in *Pasley v. Freeman*,¶ that for words spoken confidentially upon advice asked, no action lies, unless express

† Cited by Lord RUSSELL, Ch. J. in *The Queen v. Munslow*, '95, 1 Q. B. 758, 763; 64 L. J. M. C. 138, 139.—R. C.

‡ Owen, 51; Noy. 35.

§ Bull. N. P. 8.

|| 1 T. R. 110.

¶ 1 R. R. 634 (3 T. R. 51, 61).

malice can be proved. So in *Hargrave v. Le Breton*,† Lord MANSFIELD states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had heard before, but without naming the author), upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question, whether the defendant understood Watkins as asking for information for his own guidance, and that the defendant spoke what he did to Watkins, merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a *second* question to the jury, if their minds were in favour of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury. It was, however, pressed *upon us with considerable force, that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration, but upon carefully attending to the declaration and the evidence, we think we are not warranted in saying that there was no evidence to go to the jury to support the declaration; and had the learned Judge intimated an opinion that there was no such evidence, the plaintiff might have attempted to supply the defect. We, therefore, think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the Court does not mean to say that it may not be proper to put the question of malice as

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† 3 Burr. 2425.

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a question of fact for the consideration of the jury; for if the jury should think that when Watkins asked his question the defendant understood it as asked in order to obtain information to regulate his own conduct, it will range under the cases of privileged communication, and the question of malice, in fact, will then be a necessary part of the jury's inquiry; but it does not appear that it was left to the jury in this case, to consider whether this was understood by the defendant as an application to him for advice, and if not, the question of malice was improperly left to their consideration. We are, therefore, of opinion, that the rule for a new trial must be absolute.

Rule absolute.

K. B. TRINITY TERM.

1825.
June 3.
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EVANS v. VAUGHAN.

(4 Barn. & Cress. 261—269; S. C. 6 Dowl. & Ry. 349; 3 L. J. K. B. 213.)

A. being seised in fee of an estate, by lease and release executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives. A. afterwards granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor; and there was a covenant that the lessee should quietly hold and enjoy the premises *for and during the said term*, without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease being for three lives absolutely, was not conformable to the power, and became void on the death of A., and his eldest son brought an ejectment and evicted the lessee, two of the cestuy que vies being then living: Held, that the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet enjoyment. Held, secondly, that by the words, "during the said term" in that covenant, the parties intended a term to continue so long as any of the cestuy que vies survived, and not a term to continue only for the life of the grantor.

DECLARATION on a lease, bearing date the 24th of April, 1786, whereby G. Vaughan, deceased, demised to W. Evans the premises therein described; habendum to him W. Evans, and his heirs, for the natural lives of him W. Evans, since deceased, John *Evans, the plaintiff, and T. Evans, sons of the said

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W. Evans, and during the life and lives of the survivor, at the rent therein mentioned. Covenant by the lessor for himself, his heirs and assigns, that the lessee and his heirs should quietly and peacefully hold, occupy, possess, and enjoy the premises *for and during the said term*, without the let, suit, trouble, hindrance, molestation, disturbance, or interruption of the said G. Vaughan, his heirs or assigns, or any other person claiming or to claim any estate, right, or interest in or to the same premises, &c., or any part thereof, by, from, or under him or any of his ancestors. Breach, that since the death of the lessee, whose heir the plaintiff was, the plaintiff had not been permitted peaceably and quietly to enjoy the premises *for and during the said term*, without the let, suit, trouble, hindrance, molestation, disturbance, or interruption of the said G. Vaughan, his heirs, or assigns, or any other person or persons claiming or to claim any estate, right, or interest in the same premises, or any part thereof, but on the contrary thereof, that the defendant lawfully claiming an estate, right, title, and interest in and to the said demised premises, by virtue of a certain title thereto to him theretofore made and derived, by, from, and under the said G. Vaughan, after the making of the said indenture, and after the respective deaths of the said G. Vaughan and W. Evans, and before the *expiration of the said term*, to wit, on the 1st of January, 1816, at, &c., by virtue of the said estate, right, and interest entered into and upon the said demised premises, with the appurtenances in and upon the said possession of the plaintiff, and evicted the plaintiff from the same; and the plaintiff so evicted, &c. Plea, 1st. *Non est factum*. *2ndly. That defendant did not claim any estate, right, title, or interest in and to the said demised premises, by virtue of any title to him theretofore made and derived by, from, and under the said G. Vaughan. Issue thereon. 3rdly. That defendant did not enter into and upon the said demised premises *before the expiration of the said term*, upon which also issue was joined. At the trial before Abbott, Ch. J. at the Middlesex sittings after last Term, the following appeared to be the facts of the case. By lease and release of the 28th and 29th October, 1774, G. Vaughan being seised in fee simple of the demised premises (amongst others)

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upon his marriage, settled his estates, comprising the premises in question, upon himself for life, remainder to his first and other sons in tail; and the deeds contained the following leasing power, "that it shall be lawful for the person (being in possession of all or any part of the premises hereinbefore mentioned, by virtue of any of the limitations,) by any deed indented to make any lease or leases of the said premises, for any term or number of years not exceeding twenty-one years from the making thereof, or for any term or number of years determinable upon one, two, or three life or lives in possession, or by way of future interest, so as the estate in possession and future interest be determinable upon the deaths of one, two, or three person or persons, and be not to continue any longer than for the lives of three persons at the most, &c." Gwynne Vaughan, the testator and tenant for life under the marriage settlement, on the 24th of April, 1786, granted the lease mentioned in the declaration to W. Evans and his heirs, habendum to him and his heirs from the 29th of September then last for the lives of the three persons mentioned in the declaration, *and the life of the survivor; and the lease contained the covenants for quiet enjoyment there set out. The plaintiff was the eldest son and heir-at-law of the lessee, who died intestate on the 4th of August, 1796. The plaintiff entered into possession of the demised premises, and continued in possession until the 9th of November, 1816, when the defendant recovered possession in an action of ejectment, on the ground that the lease was void, not being conformable to the power, the lessor only having power to make leases for twenty-one years absolutely, or for years determinable on three lives, and the lease in question being a freehold lease for three lives. Two of the cestuy que vies were then living. Upon this evidence it was contended by the defendant's counsel, that there was no breach of the covenant; first, because the defendant could not be said to have claimed under his father, but in his own right as tenant in tail under the marriage settlement; and, secondly, that there was no eviction *during the term*, because the term granted by the lease expired upon the death of the first tenant for life. The LORD CHIEF JUSTICE was of opinion that the defendant must be considered to have claimed under his father, within the meaning of the

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covenant; and, secondly, that the words “the said term” in the lease meant the term which the lessor purported to grant, viz., a term continuing for three lives, and, therefore, there was a breach of covenant by the defendant’s eviction of the plaintiff during that term. The jury having found a verdict for the plaintiff, damages 1,500*l.*,

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W. E. Taunton now moved for a new trial upon both grounds :

He admitted, however, as to the first point, that the view taken of the subject by the LORD CHIEF *JUSTICE was supported by the decision in *Hurd v. Fletcher*.† As to the other point, there was no breach of the covenant by the defendant, because he did not evict the lessee *during* the term, but *after* it had determined. The lease not being conformable to the power, was valid only during the life of the grantor. Upon his death it became absolutely void: *Ludford v. Barber*,‡ *Doe d. Martin v. Watts*.§ The term granted by the lease was therefore determined on the death of the tenant for life. The word “term” signifies the estate and interest passed by the lease. It is true that Lord Coke, 1 Inst. 45 (b), says, that the word “terminus” signifies not only the limit and limitation of time, but also the estate and interest that passes for that time; but in the passage which immediately follows, it is clearly used as signifying the estate and interest that passed. He goes on, “as if a man make a lease for 21 years, and after make a lease to begin *a fine et expiratione predicti termini 21 annorum dimiss*: and after the first lease is surrendered, yet the second lease shall begin presently; but if it had been to begin *post finem et expirationem predicti 21 annorum*, in that case, although the first term had been surrendered, yet the second lease should not begin till after the 21 years be ended by effluxion of time.” Here Lord Coke points out the distinction between the words “time” and “term.” The words “during the said term” are therefore synonymous with the words during the continuance of the estate. Then the estate granted by the lease being at an end, and the lease

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† Doug. 43.

§ 4 B. R. 387 (7 T. R. 83).

‡ 1 B. R. 156 (1 T. R. 90).

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itself being void on the death of the tenant for life, all the covenants which related to *and were dependent on the estate granted are void also: *Northcote v. Underhill*,† *Caponhurst v. Caponhurst*,‡ *Soprani v. Skurro*,§ *Knipe v. Palmer*.¶ Here the covenant for quiet enjoyment is a covenant running with the land, relating to and dependent on the estate granted by the lease; it became void therefore on the cesser of the estate to which it related, and, consequently, there was not any breach of covenant by the defendant during the term.

ABBOTT, Ch. J. :

It is a good rule of construction that deeds should be construed so as to give effect to the intention of the parties. This case arises on a deed whereby the lessor for himself, his heirs, and assigns, covenants that the lessee and his heirs paying the rents and duties, and performing the covenants and agreements in the indenture contained, should and might peaceably and quietly have, hold, occupy, possess, and enjoy all and singular the demised premises for and during the said term, without the let, suit, trouble, hindrance, molestation, disturbance, or interruption of the lessor, his heirs or assigns, or any other person or persons claiming, or to claim any estate, right, or interest in or to the same premises, or any part thereof, by, from, or under him or any of his ancestors," and the question is, what the parties to this deed intended by the words "during the said term." It seems to me that they must have understood that term which the lessor purported to grant by the deed, viz., a term to continue for the three lives therein mentioned. It is contended, that as the lessor had not the power to grant a lease for three lives, *the term actually granted was a term to continue only for his life, and that therefore the parties to the lease must have intended by the words "during the said term," a term continuing only for the life of the lessor. Unless, however, we suppose that the lessor knew that he had no power to grant the lease for three lives absolutely, and that when he assumed so to do he was actually committing a fraud, we must understand that he

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† Salk. 199.
‡ Lev. 45.

§ Yelv. 18.
¶ 2 Wils. 130.

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intended to grant a lease to continue for three lives, and that when he covenanted that the lessee should quietly enjoy during the said term, he intended that that covenant should be binding on him and his heirs during the continuance of the three lives. I think if we were to hold that he thereby intended a term for the life of the lessor, and not for the lives of the cestuy que vies, we should be giving a construction quite contrary to the intention of the parties. The lessor says, by his deed, that the lessee shall have the estate for that period for which he purports to grant it, and it is not open to him, or any person claiming under him, to say that he meant by the words "during the said term" any other term than that which he purported to pass by his deed. I think, therefore, that the term contemplated by the parties to the deed, and mentioned in the covenant for quiet enjoyment, was a term to continue for the three lives mentioned in the lease, and that the representative of the lessor having evicted the lessee while two of the cestuy que vies were living, was guilty of a breach of the covenant for quiet enjoyment. As to the other point, this case must be governed by that of *Hurd v. Fletcher*. There a fine being levied of a *feme covert's* estate with a joint power to the husband and wife to declare the uses of the fine, and the uses having been declared in remainder to A., the husband made a lease and *covenanted for quiet possession against any persons claiming under him. A. evicted the tenant, and it was held that an action would lie against the husband's executors upon the covenant for quiet enjoyment. Upon the authority of that case, I am of opinion that the defendant was a person claiming under the lessor, within the meaning of the covenant for quiet enjoyment.

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HOLBOYD, J. :†

I think, upon the authority of the case of *Hurd v. Fletcher*, that the defendant must be taken to have claimed under the lessor within the meaning of the covenant. I am also of opinion that he was guilty of a breach of the covenant during the term, by evicting the heir of the lessee during the lifetime of two of the cestuy que vies. By the lease, the lessor assumes to convey

† Bayley, J. was absent.

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an interest in the premises demised during the lives of the three persons therein mentioned, and he covenants that the lessee shall quietly enjoy during the said term. I think that those words must be construed with reference to that term which he assumed to grant, and being so construed, it is quite clear that that was a term or interest to continue so long as any of the three lives were in being.

LITTLEDALE, J. :

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I have no doubt that the intention of the parties was, that the lessee should enjoy the demised premises during the whole of the three lives, and that we ought to construe this deed according to the intention. The case of *Wright v. Cartwright*† is an authority to shew that the word “term” may either signify the time or the estate granted. In this case, I am satisfied that it is to be taken as denoting the time during *which the lives of the three persons would endure, and that being so, I think there was a breach of the covenant for quiet enjoyment during the term mentioned in the lease. As to the other point, I entirely agree with the rest of the Court.

Rule refused.

1825.
June 4.

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STEELE v. MART.†

(4 Barn. & Cress. 272—281; S. C. 6 Dowl. & Ry. 392.)

A lease purported on the face of it to have been made on the 25th March, 1783, habendum to the lessee from the 25th March now last past for thirty-five years. There was evidence to shew that the lease was not executed until after the 25th March, 1783: Held, that it took effect from the time of delivery, and not from the day of the date, and consequently that the term commenced on the 25th March, 1783, and not on the 25th of March preceding the date of the deed.

DEBT for use and occupation. Plea, *nil debet*. At the trial before Abbott, Ch. J. at the Middlesex sittings after last Michaelmas Term, the plaintiff proved a lease of the premises in question from Elizabeth Lorymer Walker to Joseph Dale, made on the 17th December, 1787, to hold from the feast day of the birth of our Lord Christ then next ensuing, for the term of

† 1 Burr. 282.

† *Cooper v. Robinson* (1842) 10 M. & W. 694.

twenty-nine years and one quarter of a year, wanting three days, at the yearly rent of 124*l.*, payable quarterly. It was further proved that the plaintiff had married Elizabeth Lorymer Walker, and that she had since died, and that the defendant had been in possession of the demised premises from the 25th March, 1817, until the *28th March, 1818. The plaintiff also proved the original lease of the premises to John Walker, the father of Elizabeth Lorymer Walker. That lease purported to have been made on the 25th March, 1783, by William Gooding the elder, William Gooding the younger, James Gooding, and Sampson Gooding, to John Walker, of the parish of St. Mary-le-Bone, sadler, habendum to him from the feast day of the Annunciation of the Blessed Virgin Mary *then last past*, for thirty-five years; and it recited that in consideration of the rents and covenants therein contained on the lessee's part to be paid and performed, and of the surrendering and giving up to be cancelled certain indentures of lease made between the same parties, bearing date the 10th April, 1776, whereby the messuage or tenement, with the appurtenances thereafter demised and leased to the said John Walker, were demised for a term of thirty-five years from Lady-day then last, they, the lessors, had demised the premises therein particularly described, which were stated then to be in the tenure of the said J. Walker or his under tenants, &c., habendum from the feast day of the Annunciation of the Blessed Virgin Mary *then last past*, for and during, and unto the full end and term of thirty-five years then next ensuing, and fully to be complete and ended, paying during the said term of thirty-five years, unto the said W. Gooding the elder, and his assigns, if he should so long live, the yearly rent of 60*l.* on the 24th June, 29th September, 25th December, and the 25th March, by even and equal portions; and if the said W. Gooding the elder, should happen to die before the expiration of that demise, then paying during the remainder of the term from his death, to the said W. Gooding the younger, J. Gooding, and *S. Gooding, their respective executors, &c., the yearly rent of 60*l.*, on the before last-mentioned days of payment, the first payment to be made on the first of the said feast days which should happen after the decease of W. Gooding the elder;

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yielding and paying also during the aforesaid term of thirty-five years, unto W. G. the younger, J. G., and S. G., their executors, &c., the further yearly rent of 15*l.*, at the before-mentioned days of payment, the first payment thereof to begin and be made upon the *24th day of June next ensuing the date thereof*. The lease contained the usual covenants for payment of rent, &c., and was attested in the usual manner; and near to the attestation there was the following memorandum signed by all the lessors: "We whose names are under mentioned do agree to the within writings that the said John Walker for the space of thirty-five years is to pay 60*l.* per year neat money; and to prevent any dispute which might arise, we have indorsed the same from Lady-day, 1783." The lease was folded up in the usual manner, and there was the following indorsement on the back of it: "Dated the 10th of May, 1783." Upon this evidence it was contended, on the part of the defendant, that as the first lease purported to be made on the 25th of March, 1783, to hold from the 25th March then last past, that it took effect from the 25th March, 1782, and consequently that the term of thirty-five years expired on the 25th March, 1817, and that the plaintiff therefore had no interest in the premises after that period. The LORD CHIEF JUSTICE overruled the objection, and the plaintiff obtained a verdict for 250*l.*, with liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained in Hilary Term last upon the objection taken at the trial,

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Gurney (and *Tindal* was with him) now shewed cause :

Although the lease purports to bear date on the 25th of March, 1783, yet the indorsement clearly shews that it was not executed until after that time. There could be no reason for making the term commence a year before the date of the lease; for the lessee was then in possession under a lease which had many years to run. Then by the indorsement, the lessors declare that the lease was not executed until after March, 1783. There is every reason to suppose that the indorsement was written at the time when the lease was executed. The probability is, that when the parties met, the 25th of March, 1783, had been inserted in the lease, and that to prevent disputes, the memo-

random was then written, and if that be so, then it is evidence that it was not executed until after March, 1783. He was then stopped by the Court.

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Marryat and Campbell, contra :

The words of the habendum are clear. The lease is dated the 25th March, 1783, and the tenant is to hold from the 25th March *then last past*; that must mean the 25th of March, 1782, and it is not competent to a party to shew the time of the execution of a deed to be different from that which it is expressed to be on the face of it, and where there is nothing equivocal in the habendum, the other parts of the deed cannot be called in aid to explain it. Had there been any ambiguity in the habendum, the case would have been otherwise. The circumstance, therefore, of the 15*l.* rent being reserved so as to commence on the 24th of June, is immaterial. Then as to the effect of the memorandum, the words, "we have indorsed the same from the 25th March, 1783," are very ambiguous. Besides, there is no evidence to shew when *this memorandum was written, and if it was written after the execution of the lease, it cannot have the effect of enlarging or abridging the term granted by it.

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(ABBOTT, Ch. J. : Suppose it was proved beyond all possibility of doubt, that the lease was not executed until the 10th of May, 1783, is it not quite clear that the term must in law be taken to have commenced on the 25th of March in that year ?

(BAYLEY, J. : It is laid down in *Clayton's case*,† that if there be a lease for a given time *from henceforth* dated one day and executed another, it shall run from the day of the execution.)

There was no proof that the lease was executed after the 25th of March, 1783.

ABBOTT, Ch. J. :

I am of opinion that in point of law the term began to run from the Lady-day preceding the delivery of the deed, and not from the Lady-day preceding the day inserted in the deed as the

† 5 Co. Rep. 1.

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date ; and then the only question is, whether there was any satisfactory proof that the first lease was executed after Lady-day, 1783. If there was, then, as the lease was to commence from Lady-day then last past, the term granted by it would commence at Lady-day, 1783, and continue until the 25th of March, 1818. I thought at the trial there was abundant evidence to shew that the lease was not executed until after the 25th of March, 1783. The first lease purported on the face of it to have been made on the 25th of March, 1783, in consideration of the surrender of a former lease, which at that time had twenty-eight years to run, and the premises are demised to the lessee to hold from the 25th of March then last past. Now it is to be observed, that it is not usual to make a term commence from the year preceding the *execution of the lease, and there could be no reason for so doing in this case, inasmuch as the lessee's term under the former lease would continue until he surrendered it to the lessor, which probably he would not do until or about the time when the new lease was executed. I should conclude from the very terms of the habendum, that the lease was not executed until some time after the 25th of March, 1783, and the mode in which the rent is reserved leads to the same conclusion. Two rents are reserved, the one payable to Gooding the elder, the other payable to his sons ; they are both made payable *quarterly* during the term, but it is expressly stipulated that the latter rent is to begin to be payable on the 24th June then next. This shews that the parties contemplated that the term was to commence on the 25th March, 1783. Then there is a memorandum written near the attestation, and signed by all the lessors, whereby they say, " that to prevent disputes they had indorsed the same from Lady-day, 1783." The meaning of that phrase is not very precise. Whether they intended to declare by that memorandum that the lease was to take effect from that date, or whether it referred to any other indorsement, is not very clear ; but giving any sense to the memorandum, we must infer that it was not written until after Lady-day, 1783. If it refers to any other indorsement made on the lease, it must refer to the words on the back of the lease, " dated the 10th of May, 1783." I incline to think that the memorandum refers to an indorsement

already made on the lease, and it is then evidence against the lessors, that they authorized that indorsement to be written on the lease, and consequently that the lease was not executed until May, 1783. Upon the whole I am *of opinion that there was evidence to shew that the lease was not executed until the 10th May, 1783, and, consequently, that the term began to run from the 25th of March preceding.

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BAYLEY, J. :

The defendant occupied these premises from May, 1817, to May, 1818, and was liable to pay some person for the occupation during that period. The persons claiming under Gooding or Walker are the only persons who can claim the rent. Walker or his assigns may claim if the term continued till March, 1818, but it is contended that it expired in 1817, and, consequently, that Walker or his representatives cannot claim the rent becoming due after that period. The lease on the face of it purports to have been made on the 25th March, 1783, and the words of the habendum are, "to hold from Lady-day now last past." It is said, therefore, that the term granted by the lease began necessarily to run from Lady-day, 1782, and expired on Lady-day, 1817. It may, however, happen, that the lease may be dated on one day, and may, in fact, have been executed on a subsequent day; and if that be so, the lease takes effect from the day of the delivery, and not from the date. That is laid down in *Clayton's case*, 5 Co. Rep. 1. There indentures of demise were ingrossed, bearing date the 26th of May, the 25th Eliz. habendum for three years from henceforth, and the said indentures were delivered at four o'clock of the afternoon the 20th day of June in the same year, and the question was, when this lease by computation should have its beginning, whether from the day of the date, or from the delivery; and it was resolved, "that *from henceforth* should be accounted from the day of the delivery of the indentures, and not by *any computation of date, for *from henceforth* is as much as to say, 'from the making, or from the time of the delivery of the indentures,' or a *confectione presentium*, for the confection or making of the lease does begin by the delivery, and these words, *from henceforth*, or any other

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words of the indenture, are not of an effect or force until delivery *quia traditio loqui facit chartam.*" Now apply the doctrine of that case to this. Here the lessee was to hold from the 25th of March then last past. Now, according to *Clayton's* case, that must mean the 25th of March preceding the execution of the lease, and not preceding the date of the lease. There must, however, be some evidence to shew that the deed was not executed on the day when it bears date, and I think there is such evidence in this case. In the lease there is a memorandum by the only persons who had an adverse interest, that they had indorsed it from Lady-day, 1783, and it appears that on the back of the lease there are the words, "dated the 10th of May, 1783." This is a declaration by them that the lease was not executed until after Lady-day, 1783, and if they had made a verbal declaration that the lease was not executed until after the 25th of March, 1783, it would be evidence of the fact against them. Here we have a declaration in their own handwriting. I am of opinion, therefore, that we are well warranted in assuming that the lease was executed after the 25th of March, 1783. That being so, the verdict is right, and this rule must be discharged.

HOLROYD, J. :

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The question is, whether there was reasonable evidence to satisfy the jury that the lease was executed after the time when it purports to bear date. For it is clearly established, that if it be executed afterwards, it takes effect from the day of the delivery, and *not from the day of the date: and I take it to be clear that a party may shew that the deed was delivered on a different day from that on which it bears date: *Oshey v. Sir Baptist Hicks*.† In covenant upon an indenture dated the 9th of October, to pay for goods then laden, or afterwards to be laden on board such a ship, it was held that the defendant might traverse the delivery on the 9th, and plead that the deed was sealed and delivered on the 28th, and that no goods were then or afterwards shipped, for he was not bound to pay for any goods shipped after the date and before the delivery of the deed; and it was held, that although it should be intended that every

† Cro. Jac. 263.

deed was delivered on the day it bears date, unless the contrary be proved, yet that the words of the deed, that he should pay for the corn *then* laden, referred to the time of the essence of the deed by the delivery, and not to the date. Then that being so, the only question is, was there evidence to satisfy the jury that the deed was executed after the time it purported to bear date? I am satisfied that from the indorsement it may reasonably be collected that it was executed after the time when it purports to bear date, and therefore the rule for entering a nonsuit must be discharged.

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LITLEDALE, J. :

It appears to be clearly established, that if a lease be executed on a day after the day of the date, it takes effect from the day of delivery, and not from the day of the date. My doubt has been, whether in this case there was evidence to shew that the lease was executed after the 25th of March, 1783. I am inclined, however, to think that there was evidence from which a jury *might reasonably draw the conclusion, that the lease was not executed until after the 25th of March, 1783, and that being so, then the lease took effect from the 25th of March preceding the execution.

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Rule discharged.

1825.
June 6.

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SKYRING, ADMINISTRATRIX OF G. SKYRING, v.
GREENWOOD AND COX.†

(4 Barn. & Cress. 281—291; S. C. 6 Dowl. & Ry. 401; S. C. at Nisi Prius,
1 Carr. & P. 517.)

The paymaster of a military corps had given credit in account to an officer in that corps from the 1st January, 1817, to the 5th November, 1820, for certain increased pay, erroneously supposed to be granted by a general order of the 27th August, 1806, to an officer of his situation, and a statement of that account was delivered to the officer in 1821. In December, 1816, the paymasters were informed by the Board of Ordnance that the increased pay granted by the order of 1806 would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer until 1821, and subsequently to that time they continued to receive his pay: Held, in an action brought by his personal representative to recover such pay, it was not competent to the paymaster to retain any of such sums of money on account of the sums which they had credited him for by way of increased pay, and which they had allowed him to consider his own for so long a period of time.

ASSUMPSIT for money had and received by the defendants to the use of G. Skyring in his life-time, and to the use of the plaintiff, as administratrix since his death. Plea, general issue. At the trial before Abbott, Ch. J., at the Middlesex sittings after last Michaelmas Term, the following appeared to be the facts of the case: The plaintiff was administratrix of the late G. Skyring, who was major in the Royal Artillery. The defendants were paymasters of the Royal Artillery, and held their office by commission, as other officers in the corps hold theirs. The pay of the whole army was fixed by regulations established in 1806. These regulations were made known to the different branches of the army by general orders issued from the respective proper departments, and the general order for the ordnance or artillery issued from the head quarters at Woolwich, in August, 1806, in these words: "His Majesty having been most graciously pleased to express his *approval of the classes of officers, non-commissioned officers, and gunners of the royal regiment of artillery

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† Cited in judgments of the Judicial Committee in *De Cordova v. De Cordova* (1879) 4 App. Cas. 692, 700; and *Daniell v. Sinclair* (1881) 6 App.

Cas. 181, 190. Distinguished in *R. v. Blenkinsop*, '92, 1 Q. B. 43; 61 L. J. M. C. 45.—R. C.

partaking of the advantages in point of pay granted to the infantry, as far as the several ranks of one service correspond with those of the other, to commence from the 1st of July, 1806; the following rate of increase to the pay is announced in orders, and attaches to the invalid battalions, marching battalions, horse brigade, foreign and the King's German artillery, viz. (amongst other ranks) captain and second captain 1s. 1d. per diem, two shillings per diem more to captains having the brevet rank of major or any superior rank, adjutants and quarter-masters who hold two commissions are not entitled to the increase of pay. First gunners are entitled to the same increase of pay as gunners. The above increase of pay and allowances to officers are granted under the same restrictions as the allowance of one shilling a day, added to the pay of subalterns in 1797, and, consequently, the difference between the former and increased rates is not in any case to be received by an officer holding more than one military commission or appointment, nor to give claim to any higher half pay on reduction." The regulations of 1797 were likewise published by a general order, dated the 28th of July in that year, and were in the following words: "His Majesty is graciously pleased to order, that from the 25th of last month, an allowance of one shilling per diem shall be made to each captain, first lieutenant, adjutant, and quarter-master belonging to the marching and invalid battalions of the royal regiment of infantry artillery not holding another commission." G. Skyring was a captain in the royal regiment of artillery, having also the brevet rank of major before *the 1st of January, 1817, and from thence to the 5th of November, 1820, when he obtained the regimental rank of major, and during the same time had the appointment of brigade-major of the garrison of Gibraltar. There was a running account between Major Skyring and the defendants from the 1st of January, 1817, to the 31st of December, 1820, in which credit was allowed to him for his pay to the 5th of November, 1820, including therein 1s. 1d. per day increase of captain's pay granted by the order of the 27th of August, 1806, from the 1st of January to the 31st of December, 1817, amounting to 19l. 15s. 5d., and two shillings a day increase granted by the same order to captains having the brevet rank of major, from

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SKYRING
 GREENWOOD. the 1st of January, 1817, to the 5th November, 1820, amounting to 140*l.* 10*s.*, which two sums make together 160*l.* 5*s.* 5*d.*, and a statement of that account was delivered to Major Skyring early in 1821, and there appeared due to him on the balance thereof 116*l.* 9*s.* 7*d.* Major Skyring was allowed credit for these sums of 1*s.* 1*d.* and 2*s.* a day in the account, in conformity with the usage which prevailed in paying other officers of the regiment having the same rank and appointment during the same period, and which had prevailed from the date of the general order of the 27th of August, 1806, and according to which all such payments have been allowed by the Board of Ordnance in the account of the defendants with them to the 31st of December, 1816.

[*284] The Board of Ordnance, in December, 1816, intimated to the defendants that they would not allow any payments of the 1*s.* 1*d.* and 2*s.* a day to officers having the rank and appointment which Major Skyring had, and that the same were not warranted by the order of 1806; but this intimation was not communicated to Major *Skyring otherwise than by the defendants ceasing to allow him credit for the 1*s.* 1*d.* a day after the end of 1817, and writing to him the following letter, dated the 8th of May, 1821. "SIR,—We beg to acquaint you that a deduction has been made by the Honourable Surveyor General from your regimental pay, and which has been confirmed by the Board, of 89*l.* 14*s.* 5*d.*, being the increase of 1*s.* 1*d.* and 2*s.* brevet per diem, granted by the regulations of 1806, but to which it appears you were not entitled, having held the appointment of brigade-major at Gibraltar from the 1st of July, 1806, to the 5th of November, 1820, in addition to your commission as an officer of artillery. We have, therefore, to request you will make a remittance for the above sum. Memorandum. Increase pay 1*s.* 1*d.* 1st of July, 1806, to 31st of December, 1816, and brevet pay 2*s.* per day, 4th of June, 1813, to the 5th of November, 1820."

The sum of 89*l.* 14*s.* 5*d.* mentioned in that letter, included the 160*l.* 5*s.* 5*d.* hereinbefore mentioned. The Board of Ordnance refused to allow the defendants any payments of the 1*s.* 1*d.* and 2*s.* a day subsequent to the 31st of December, 1816. The running account between Major Skyring and the defendants was continued to the 6th of December, 1822, the day of his death, during which

time his pay and various sums on other accounts received and paid by the defendants by his order, were placed to his account, but no statement of the account was delivered to him by the defendants.

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The defendants, after the death of Major Skyring, delivered to the plaintiff a statement of their account with him to the day of his death, in which they brought forward, and amongst other items allowed him credit for *the 116*l.* 9*s.* 7*d.* balance due on the former statement of the account, and charged him with the aforesaid sum of 391*l.* 14*s.* 5*d.*, which included the 160*l.* 5*s.* 5*d.* as aforesaid. But the charge of 391*l.* 14*s.* 5*d.* has been since reduced by the defendants to the said 160*l.* 5*s.* 5*d.*, which latter sum the defendants claimed a right to retain, on the ground of their having by mistake allowed to Major Skyring 1*s.* 1*d.* a day from the 1st of January to the 31st of December, 1817, and 2*s.* per day from the 1st of January, 1817, to the 5th of November, 1820, making the amount of 160*l.* 5*s.* 5*d.*, as ordnance pay beyond the amount of which the ordnance regulations entitled him to. Upon these facts the LORD CHIEF JUSTICE was of opinion, that the account rendered by the defendants in 1821 was an admission by them that they had received the allowances in question on account of the plaintiff, and that they were not entitled afterwards to rescind the admission, because they had received a communication in 1816 from the Board of Ordnance that those additional allowances would not be allowed, and they never communicated that intimation to Major Skyring, and under these circumstances a verdict was found for the plaintiff. A rule *nisi* having been obtained for a new trial,

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Scarlett and Bingham now shewed cause :

The defendants are not entitled to set off the sums which they have allowed Major Skyring in account, although, according to the true construction of the order, they may not have been due to him of right. If the defendants had actually paid those sums to Major Skyring with a full knowledge of all the facts of the case, but under a mistaken view of his right, they could not afterwards have *recovered them back : *Bilbie v. Lumley*,† *Lowry*

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† 6 R. R. 479 (2 East, 469).

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v. *Bourdieu*;† and the reason of this rule of law is given by GIBBS, Ch. J. in *Brisbane v. Dacres*.‡ That was an action against the widow of Admiral Dacres, to recover a sum paid to him by Captain Brisbane, as his share of certain freight for the carriage of bullion, which share he was entitled to according to an old usage prevailing in the navy, though not according to a practice introduced recently before the payment, but overlooked by the parties. GIBBS, J., HEATH, J., and MANSFIELD, Ch. J., agreed against CHAMBERE, J. that the action could not be maintained. GIBBS, J. there says: “I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law, and, it may be, his subsequent opinion may be the correct one. If we were to hold otherwise, many inconveniences may arise; there are many doubtful questions of law: when they arise, the defendant has an option, either to litigate the question, or to submit to the demand, and pay the money. I think that by submitting to the demand, he that pays the money *gives* it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the Statute of *Limitations, to rip up the matter and recover back the money. He who receives it is not in the same condition: he has spent it in the confidence it was his, and perhaps has no means of repayment.” It is true, that in this case the money has not been actually paid into the hands of Major Skyring, but he was allowed credit for it in the account delivered to him in 1821, and he was thereby led to suppose that he was entitled to treat it as his own. The reasoning of GIBBS, J. applies equally to a case where the money has been allowed in account, as to one where it has been actually paid; for a party to whom an account is delivered by his agent, calculates his expences with reference

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† Doug. 467.

‡ 14 R. R. 718 (5 Taunt. 143).

to that account. The allowance of these sums in account is equivalent to payment. In *Jeffs v. Wood*,† it was held that the set-off of one sum of money against another upon the balance of account amounted to payment. Here too the defendants were informed in 1816 that the Board of Ordnance would not allow these sums to persons in the situation of Major Skyring, and they never communicated that fact to him until 1821. If they had informed him at that time that the sums were not to be allowed, he would not have treated them as his own property.

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They then proceeded to argue, that the defendants by reason of their character of paymasters were estopped by the account they had rendered, from saying that the money which they had allowed in account was by mistake. The paymaster receives the money due to the corps from Government, and when he has once represented to an officer, by an account rendered, that he has *received money on his account, he is estopped from afterwards saying that he has not received such money. [*288]

But it is unnecessary to report the arguments on this point, as the judgment of the Court proceeded entirely on the first ground.

Gurney and Tindal, contra :

It must be admitted, that if the defendants had paid these sums to Major Skyring with a full knowledge of all the facts, they would not be entitled to set them off, but here there never was any payment. That distinguishes this from the several cases cited. Here the defendants have merely rendered an account, in which they have, by mistake, allowed the deceased credit for sums to which he was not entitled, and they ought in justice to be permitted to correct the error, when they discover it.

ABBOTT, Ch. J. :

It is not necessary to decide in this case, whether the defendants by reason of their character of paymasters are estopped, by the account which they have rendered, from saying that there was a mistake in it. The opinion which I entertained at the trial was founded on a particular fact in this case, and that

† 2 P. Wms. 128.

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opinion remains unaltered. The defendants, as paymasters, received sums from Government generally on account of the corps, and an order having been issued for an increase of pay, they rendered an account to Major Skyring in 1821, in which they gave him credit for the increased pay to which they supposed him to be then entitled, and upon that account there appeared to be due to Major Skyring a balance of 116*l.* 9*s.* 7*d.* If he had drawn a bill upon them for that amount, it probably would have been paid, and if they had paid the money, *it is quite clear that they could not afterwards have recovered it back, on the ground that according to the true construction of the order it was not due to Major Skyring; and if the defendants could not have recovered it back, they ought not now to be allowed to set it off. The defendants afterwards continued to receive further sums on account of Major Skyring, and the money so subsequently received by them must be considered as paid off, if they are entitled to bring back into the account the sums which they had given him credit for, in respect of the increased pay. The particular fact in this case upon which my judgment proceeds is, that the defendants were informed in 1816 that the Board of Ordnance would not allow these payments to persons in the situation of Major Skyring, but they never communicated to him that fact until 1821, having in the meantime given him credit for these allowances. I think it was their duty to communicate to the deceased the information which they had received from the Board of Ordnance; but they forbore to do so, and they suffered him to suppose during all the intervening time that he was entitled to the increased allowances. It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back. Here the defendants have not merely

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made an error in *account, but they have been guilty of a breach of duty, by not communicating to Major Skyring the instruction they received from the Board of Ordnance in 1816; and I think, therefore, that justice requires that they shall not be permitted either to recover back or retain by way of set-off the money which they had once allowed him in account.

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BAYLEY, J. :

This may be a case of hardship upon the defendants, but they have brought it upon themselves. This is an action for money had and received. If the defendants are entitled to set off the sum they claim, the action is not maintainable. From the year 1816 to 1821 the defendants had given credit for certain sums, as if Major Skyring was entitled to them. I think they were guilty of a neglect of duty in not communicating to him the information they had received from the Board of Ordnance in 1816. Suppose that the balance of the account delivered in 1821 had been paid to Major Skyring, and that no subsequent pay had been received for his use by the defendants, and that they had brought an action to recover back the money paid. It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit, and that they had told him that they had received the money for his use, and that on the faith of their representation he had drawn it out of their hands as his own money, and had been induced to spend it as such; and if they could not recover the money back, neither ought they now to be allowed to retain other monies belonging to the deceased, upon the ground that they have paid or allowed him in account money which they had not in fact received to his *use, but which they suffered him to consider his own for a long period of time. I think they cannot now be permitted to say, that the money which they allowed him in account as money received by them to his use, was not money received to his use. The rule for a new trial must therefore be discharged.

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HOLROYD, J. :

The present action is brought for money had and received by

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GREENWOOD. the defendants to the plaintiff's use, subsequently to the communication made by the Board of Ordnance to the defendants, and of which the deceased was not informed till 1821. The plaintiff has a right to recover, unless the defendants have a debt to set off. Now Major Skyring had a right to expect that money belonging to him would be received by defendants for him, and that all payments made by them were on account of monies so received by them. Suppose that Greenwood & Co. had paid Major Skyring the balance of the account in 1821, and that no money belonging to him had come subsequently to their hands, they could not have recovered that money back, on the ground that they had paid it to him under a mistaken notion that he was entitled to it. A payment, therefore, made under such circumstances, would not create a debt between the defendants and Major Skyring. Here, it is true, the defendants did not pay the balance. But they now say, that some of the money which they paid to Major Skyring was not paid to him, on account of monies received for him by them, but was paid by them under the mistaken notion that he was entitled to it, and, therefore, that such payment constituted a debt from Major Skyring to them, which they are now entitled to set off; but I think, for the reasons already given, it did not constitute a debt, and that being so, the plaintiff is entitled to recover.

Rule discharged.

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(4 Barn. & Cress. 292—311; S. C. 6 Dowl. & Ry. 413.)

1825.
June 7.

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A., being a commissioned officer on full pay in a regiment, was appointed civil superintendant of a colony, and at the same time was appointed to the command of such of his Majesty's subjects as then were armed or might thereafter arm for the defence of the settlers in the colony: Held, that the appointment to command all persons armed in defence of the settlers in the colony, vested in him the right to command the military forces there.

After he had acted as military commander there for some years, the regiment in which he held a commission was disbanded, and he was put upon half-pay. Both before and after the disbanding of the regiment, he acted as military commander and civil superintendant of the colony, and he was recognised as filling both characters by the authorities at home: Held, that although by the disbanding of the regiment he lost his commission and rank in the regiment, the right to command the king's troops at the colony continued, and therefore that he was justified in putting under arrest, for disobedience of orders, a commissioned officer on full pay, holding equal regimental rank with himself.

TRESPASS for false imprisonment. Plea, that defendant was a commissioned officer, viz. a lieutenant-colonel in the army of the King, and as such officer, was employed in the service of the King, and had the military command, conduct, care, government, and direction of certain land forces of the King, then being employed in the service of the King in parts beyond the seas, to wit, at Honduras, in North America; and that plaintiff was a commissioned officer, viz. a major in the army of the King, and as such officer, was employed in the service of the King, and serving amongst the said land forces of the King at Honduras, and was under the military orders and command, and the government and direction of the defendant as such officer as aforesaid at Honduras; and that defendant being such officer, and being so employed, and having such command, &c., as aforesaid, and plaintiff being such officer as aforesaid, and so employed, and serving and being under such orders, &c., as aforesaid, plaintiff, a little before the time in the first count mentioned, to wit, on the same day and year, did, contrary to his duty as such officer, endeavour to excite and stir up a mutiny amongst the forces of the King at Honduras, in breach of good order and military discipline, whereupon the defendant *put the plaintiff under

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arrest, &c. The third plea, instead of charging that the plaintiff endeavoured to excite mutiny, stated that he did without any lawful authority assume to himself the command of the land forces at Honduras. The fourth plea stated, that the plaintiff refused to obey a certain military order of the defendant as such officer as aforesaid, which order extended to the plaintiff in relation to his duty as such officer as aforesaid, and which order it was the plaintiff's duty to have obeyed. There were other pleas which stated the defendant to be his Majesty's commandant of the garrison at Honduras.

Replication, *de injuria* and a new assignment, that defendant on other times and on other occasions, and for a much longer time than was lawful or necessary for the causes in the pleas mentioned, to wit, on the 1st June, 1820, and from thence continually for a long time, to wit, for nine months thence following, wrongfully imprisoned the plaintiff without any lawful authority, or any reasonable or probable cause whatsoever. There were several special pleas to this new assignment which it is unnecessary to mention.

At the trial before Abbott, Ch. J., at the London sittings after Trinity Term, 1824, the following appeared to be the facts of the case. In July, 1814, the defendant then being a major in the 7th West India Regiment, was appointed by the Duke of Manchester, the then Governor of Jamaica, his Majesty's superintendant of the British settlement at Honduras, and was directed by that appointment to take under his care the interest of his Majesty's subjects there; and about the same time he received from General Fuller, the commander of the forces in the island of Jamaica and its dependencies * (Honduras being one of those dependencies), an appointment in the words following: "I do hereby constitute and appoint you, the said George Arthur, to command such of his Majesty's subjects as are now armed, or may hereafter arm for the defence of the settlers of the bay of Honduras, you are therefore, as commandant, to take upon you the care and charge accordingly." After the defendant received these appointments, he took upon himself these offices, and acted as the military commandant at Honduras, and issued all orders as such until he quitted the settlement in 1822. In

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1817 he was made lieutenant-colonel of the York Chasseurs. That regiment was disbanded in 1819, and on the 24th of August in that year the defendant knew that they were so disbanded. He continued, however, to act as military commandant of Honduras. The plaintiff, in March, 1820, was at Honduras, and at that time had been promoted to the rank of lieutenant-colonel in the 2nd West India Regiment, and was on full pay, and thinking that the defendant, in consequence of the disbanding of the York Chasseurs, had become incapable of holding any military command, and that the right, therefore, to command the troops devolved upon him as the officer next in rank, the plaintiff refused to obey an order issued by the defendant, for convening a general meeting of the officers at Honduras, at ten o'clock on the 23rd of May, 1820, and issued a counter order convening a meeting of the officers at his, the plaintiff's quarters, at ten o'clock on the same day. By an order issued by the defendant, the plaintiff was put under arrest for having refused to attend at the Government House on the 23rd of May, and for having presumed without any authority to assume the command of the troops, and as such, to issue garrison orders. It appeared further by *the evidence of Sir Henry Torrens, Sir Herbert Taylor, and other military men, that according to their understanding, when an officer holds a commission in a regiment, and has also a military command in a settlement, the latter is not affected by the disbanding of the regiment to which he belongs, but that the general military command continues after the regiment is disbanded, although his rank in the regiment is at an end. Some of the witnesses stated that the very office of superintendant carried with it a military command. This evidence was objected to by the plaintiff. It was further proved that the commander of the forces at Jamaica had the right to appoint a military commandant at Honduras, and that the defendant was recognised in the settlement, and by the authorities at home as the military commandant of Honduras, both before and after his regiment had been disbanded. After the arrest of the plaintiff, the defendant transmitted dispatches on the subject to General Walker, the then commander of the forces in Jamaica, and the latter transmitted the same to the commander-in-chief

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for his direction as to the course to be pursued under the circumstances, and in the result the plaintiff was dismissed from his Majesty's service. But it appeared that the plaintiff was detained in custody for some time after the defendant knew that he was dismissed from the army. Upon this evidence the LORD CHIEF JUSTICE was of opinion, that it had been made out in proof, that at the time when the plaintiff was put under arrest the defendant was the commanding officer at Honduras, and that the justifications were established; but he left it to the jury to say, whether the plaintiff had not been detained in custody for a longer period than he ought to have been, after the defendant knew *that he had been dismissed the army. The jury found a verdict for the defendant upon the justifications, and for the plaintiff upon the new assignment with 100*l.* damages. A rule nisi for a new trial was obtained by the plaintiff in last Michaelmas Term upon two grounds; first, that the evidence of the usage in the army was not admissible; and, secondly, that the defendant having by the disbanding of his regiment lost his commission, had thereby become incapable of holding the office of commandant of the settlement, and consequently was not the commanding officer at Honduras at the time when the plaintiff was put under arrest.

The *Attorney-General*, Gurney and Parke, now shewed cause:

The first clause in the Mutiny Act† provides, that “any person who shall disobey any lawful command of his superior officer, or shall desert his Majesty's service, whether such offence shall be committed within this realm, or in any other of his Majesty's dominions, or in foreign parts upon land or upon the sea, shall suffer death, or such other punishment as by a court martial shall be awarded.” By the articles of war it is made imperative, “that whenever any officer or soldier shall commit a crime deserving a punishment, he shall by his commanding officer be put in arrest if an officer, or if a non-commissioned officer or soldier, be imprisoned until he shall be either tried by a court martial, or shall be lawfully discharged by a proper

† See now the Army Act, 1881, s. 9.—R. C.

authority." Now it is admitted that there was a lawful command, and a disobedience of that command; and the only question is, whether Colonel Arthur was or was not the superior officer at the time of giving this order. The Mutiny Act enables the King to have a standing army in time of peace, and *the King governs it by virtue of his prerogative, by which he has the sole command of all the forces in the kingdom. The King may appoint all the subordinate officers in the army. Their relative rank depends upon him. There is no written law by which relative military authority is ascertained; it is established by the usage of the army entirely. The question in this case therefore was, what was the usage and practice of the army recognised by the Crown? Now, the evidence established, that the usage and practice was to appoint officers to special commands who held regimental commissions before; and that, if at the time of their appointment to the special command, they held regimental commissions, their new appointment did not cease with their regimental commission. If, therefore, this usage and practice was properly admitted in evidence, it establishes the defendant's case. Now *Barwis v. Keppel*† is an authority to show that this evidence was properly received. That was an action brought by a serjeant of the guards against the commanding officer, who was a major commanding the battalion, for reducing him to the ranks, in consequence of the disobedience of an order; and by the articles of war, "non-commissioned officers may be discharged as private soldiers, either by order of the colonel of the regiment or by the sentence of a regimental court martial." In the special case it was stated that it was generally understood in the army, that the whole power of the colonel devolves in his absence on the commanding officer for the time being, and that, in fact, such commanding officer ranks as colonel, and always acts as such; that by the constant custom and practice of the army, the commanding officer for the time being had always made serjeants, and *broke and reduced them in the same manner as the colonel himself might have done if actually present. In that case, therefore, the usage of the army was stated as a fact. Here the defendant

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†.2 Wils. 314.

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was duly appointed superintendant of Honduras, and being then a military man, the very office of superintendant carried with it the supreme military command. Next there was the appointment of General Fuller, and it appears by the evidence that General Fuller had power to appoint a military commandant. Besides, after the appointment was made, the defendant was recognised by the authorities at home as the commandant, they having corresponded with him after the disbandment of the regiment. And the articles of war allude to the power of inferior officers to grant commissions. By the second article, "colonels, majors, captains, and other inferior officers serving by commission from the governors, lieutenants, or deputy governors, or presidents of the council for the time being of our said provinces, and colonels in North America, shall on all detachments, courts martial, or other duty wherein they may be employed in conjunction with our regular forces, have rank next after all officers of the like rank serving by commissions." The written law of the army, therefore, alludes to that power of granting commissions, which was proved to exist in this case.

Brougham, Evans, and Cameron, contra :

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The defendant is entitled to retain his verdict upon the justifications if it has been proved that he was a military officer, having the military command over the plaintiff at the time when the latter was put under arrest. There are two ways in which a man may fail to have the military command which he assumes to have; he may be incapable of holding the *command by whomsoever he pretends to have been appointed, or he may not have been appointed whether he were capable of holding it or not. It is not disputed that the Crown has the power to appoint any person, even a mere civil person, to a military command. But the Crown did not delegate either to the civil governor of Jamaica or to the military commandant there, the power of granting commissions, and it may be questioned whether such an authority could be delegated. By the statute 13 & 14 Car. II. c. 8, s. 2,† authority is given to lord lieutenants of counties to grant com-

† Repealed in part S. L. R. Act, 1863.—R. C.

missions in the militia.† Now this shews that it required the authority of parliament to enable a subject to grant commissions. The East India Company, who have the government and the territorial authority in India, yet have a special authority, by statute, to grant commissions to cadets to hold military appointments. Formerly the lord high admiral had authority to grant commissions, but when lords commissioners were appointed to execute the office of lord high admiral, there was a difference of opinion among lawyers, whether the lords commissioners had authority to grant commissions; and the statute of 1 & 2 W. & M., stat. 2, c. 2, s. 2, declared that they should have the same power in that respect as the lord high admiral. But assuming that the Crown might delegate the power to grant commissions, that power was not delegated to General Fuller. There was no evidence of such delegation, and it could not properly be assumed, but ought to have been proved by the defendant. One of the pleas states that the defendant was his Majesty's commandant of the forces at Honduras. There is no such rank in the army as commandant; it is a term which applies to the senior officer in the place. If this be a mere appointment *and not a substantive commission, then it might be contended that an officer with a mere appointment might command a commissioned officer. By the Mutiny Act, none but commissioned officers can sit upon courts martial. By sect. 18 of the articles of war, "all commissions granted by the King, or by any of his generals from him, shall be entered in the books of the secretary at war or commissary general, otherwise they will not be allowed of." Now it was not shewn that the defendant's commission was granted by a general, or that it was entered in the books of the secretary at war or the commissary general. As a commission, therefore, it was clearly void. But supposing that General Fuller had the power to grant a commission, he has not exercised it. The commission issued by him to the defendant is, "to command such of his Majesty's subjects as are now armed, or may hereafter arm for the defence of the settlers." Now this is not the language used by the Crown when it grants a military command. The words used by the Crown in conveying military

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† See now the Militia Act, 1882, s. 6.

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commissions to military persons are, "to command officers and soldiers, forces and armies," and those words are used in the Mutiny Act and the articles of war to denote a military force; but the words used in General Fuller's commission describe volunteers or settlers, who arm to repel the violence of the natives or foreign enemies. Assuming, however, that General Fuller had power to grant a military command to a military person, and that the defendant at one time was entitled to the command, still as it was proved that his regiment was disbanded before the time when he caused the plaintiff to be arrested, he had then ceased to have any right to command the troops. It is admitted that he was not any longer liable to martial law.

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Now, no person can command military *men, as a military man, unless he is liable to the same law and government. It would be a monstrous proposition to say that a man could govern others by martial law, he himself not being subject to the same law. It is said, that a man who has once been in the army does not lose his military character by being placed upon half pay. But *Bowler v. Owen*† is an authority to the contrary. There the defendant was an out-pensioner of Chelsea College, and the question was, whether or not he was entitled to the benefit of the clause in the Mutiny Act, whereby a soldier or officer in his Majesty's service was not liable to be arrested unless he owed a sum of money to a certain amount. The Court held he was not, being under no military discipline, and subject only to the control of the commissioners.

The evidence of usage was inadmissible, for the question was, whether the defendant was by law the officer in command at Honduras, and that must entirely depend upon the rank which he held in the army. *Barwis v. Keppel*‡ is distinguishable from the present case upon three grounds: first, the usage there was made a part of the special case, it could not therefore be the subject of argument or decision; secondly, that was an action on the case for reducing an officer of the guards to a common soldier, and it might be proper to adduce usage to shew that there was no malice in doing that which might legally be done; there all that was done was depriving the plaintiff of his pay as

† Barnes's Notes, 432.

‡ 2 Wils. 314.

serjeant, but here the plaintiff was deprived of his liberty. In *Grant v. Sir Charles Gould*† Lord LOUGHBOROUGH says, “where martial law prevails, the authority under which it is exercised claims jurisdiction over all military persons, in all circumstances. Even their debts are subject to *inquiry by a military authority: every species of offence committed by any person who appertains to the army is tried not by a civil judicature, but by the judicature of the regiment or corps to which he belongs.” *Barwis v. Keppel* was decided upon the distinction which was adverted to by Lord LOUGHBOROUGH in *Grant v. Gould*. The plaintiff and defendant there were subject to martial law, and not to the civil law; and in that case the Court said, “By the Act of Parliament to punish mutiny and desertion, the King’s power to make articles of war is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or articles of war.” Now that case was cited to shew that usage was a criterion to construe the Mutiny Act and articles of war, although the Court expressly say that the King acted by virtue of his prerogative, and without the statute or articles of war. In *Sheppard v. Gosnold*‡ the question was, whether goods saved from wreck were liable to tonnage and poundage. The LORD CHIEF JUSTICE, after shewing that the words of the statute did not apply to the case, says: “The second objection is, that the King’s officers, by usage, have had in several Kings’ times, the duties of tonnage and poundage from wrecks. We desired to see ancient precedents of that usage, but could see but one in the time of King James, and some in the time of the last King, which are so new that they are not considerable. Where the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus et norma loquendi* is governed by usage, and the meaning of things spoken or written must be, as it hath constantly been received to be, by common acceptation. But if usage hath been against the obvious meaning of an Act of Parliament, by the *vulgar and common acceptation of the words, then it is rather an oppression of those concerned, than an exposition of the Act, especially as the usage may be circumstanced. As, for instance, the customers seize a man’s goods

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† 3 R. B. 342, 343 (2 H. Bl. 69, 98).

‡ Vaughan, 159.

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under pretence of a duty against law, and thereby deprive him of the use of his goods until he regains them by law, which must be by engaging in a suit with the King; rather than do so he is content to pay what is demanded for the King. By this usage all the goods in the land may be charged with the duties of tonnage and poundage; for when the concern is not great, most men (if put to it) will rather pay a little wrongfully than free themselves from it over-chargeably." Now the reasoning of the LORD CHIEF JUSTICE applies to the present case, for if there was danger in that case that persons should submit to an ancient poundage, there is much more danger that persons who are liable to be discharged from the army at a moment's notice should submit to a pretended usage although set up for the first time.

ABBOTT, Ch. J. :

I am of opinion that in this case the rule for a new trial must be discharged. It does not appear to be questioned that at the time when the defendant received his appointments, whatever their nature might be, from the Duke of Manchester and General Fuller, he was a person capable of receiving an appointment to a military command. Indeed that could not be disputed, because he was then an officer holding a commission in his Majesty's army on full pay. If then he was capable of receiving a military command at that time, the next point is, was any military command given him. He was appointed by the Duke of Manchester to be superintendant, which is considered a civil appointment. At the same time, General Fuller, who *then had the command of the troops on that station, gave him that appointment, upon which much observation has been made. By that he was to take upon him the command of all persons armed or to be armed for the defence of the settlers. It is said those expressions are not conformable to the language used by the Crown in military commissions properly so called, and I do not know that they are; but it seems to me they are in themselves clear, and that they necessarily import, that Colonel Arthur was to take the military command of the soldiers as well as others; and, therefore, I think, notwithstanding the language of it, we must consider that it was intended to give to him the supreme

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military command, as connected with the civil superiority conferred upon him by the Duke of Manchester. Then it is said that whatever the effect of that might be, yet that as soon as the regiment in which he held the commission was disbanded, and he was put upon half-pay, he ceased to be capable of exercising those military functions which he might have exercised before. Now the command of the army belongs entirely to his Majesty, it is a matter for his discretion and his authority only, except so far as this discretion and authority are regulated and controlled by the statute laws. We must look therefore at the statute only, and to the articles of war, which are an emanation from his Majesty under the statute law, for any illustration of that authority. The Mutiny Act contains nothing upon this subject. The articles of war do not appear to me to contain any thing that can cast a light upon it. The book called "Rules and Regulations for the Government of the Army" is not a book of which we can take judicial cognizance.† We are required to take judicial notice of the articles of war, but *we are not required to take judicial notice of any other regulations, and therefore they must be brought before us by proof in the same manner as any other fact. There being then nothing in any Act of Parliament, or in the articles of war, to shew that a person well appointed in the first instance, as I conceive the present defendant to have been, shall lose his authority as soon as it may happen that the regiment in which he held a commission is disbanded, I think that the authority must be considered to have continuance until the Crown thinks proper to put an end to it. The defendant's authority at Honduras had no connection with his situation in the regiment. No part of the regiment was stationed at Honduras, and if we were to hold that the disbanding of the regiment put an end to his authority, it must put an end to it immediately, and then the greatest mischief would arise; it would, for some time at least, remain uncertain who was to take the command, and if he continued in command, as he would do, until the notification of the fact of disbanding, every act he might do in the interval would be void: the mischief and

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† This book had been adverted to by the defendant's counsel in the course of the argument.

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inconvenience of that would be so great, that unless we are informed by some fixed proposition of law that, having authority to hold such an appointment, his authority ceased upon the disbanding of the regiment, the argument must fail. It appears to me therefore that having been well appointed in the first instance, his authority continued, notwithstanding the disbanding of the regiment, until it was the pleasure of his Majesty to put an end to that authority by appointing some other person, or withdrawing this officer. Nothing of that kind was done. I do not rely to any great extent upon the opinions given to us at the trial, although they came from very high authority as the opinions of experienced *individuals; but this fact we had most distinctly in evidence that, notwithstanding the disbanding of the regiment to which the defendant belonged, he corresponded with the authorities at Jamaica, and with the authorities in this country, in the same way as before, and was recognized by those authorities as still continuing to hold the command. That recognition by the authorities at home appears to me clearly a recognition by his Majesty, because when in consequence of the unfortunate dispute that has led to the present action, each party applied to head-quarters at home, what was the result? His Majesty himself so far acknowledged the authority of the defendant as to disapprove in the strongest way of the act of the plaintiff in endeavouring to take the command upon himself, and actually to dismiss the plaintiff from his situation, which is a direct recognition by the King himself that the defendant, notwithstanding the disbandment of that regiment, of which he was an officer, still continued to have the superior military command. As therefore there is no rule of law or any written authority to prevent us from giving effect to that which is manifest to us as having been the pleasure of his Majesty, having the direction of the army, we are bound to say that the plaintiff was lawfully put under arrest, the result of which is that the pleas of justification were made out in proof, and that the rule for the new trial must be discharged.

BAYLEY, J.:

In this case I think that we are not warranted in saying that

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the authority communicated to Colonel Arthur had terminated, but that it continued down to the period at which the arrest of the plaintiff took place. If the Mutiny Act or any other Act of Parliament, or if the articles of war, which have the same effect, had prescribed the power of the commander-in-chief *upon the station, and had pointed out to him upon what particular description of persons only the command should be conferred, that Act of Parliament or those articles of war would have been binding upon General Fuller and the Duke of Manchester; and any appointment in opposition to them would have been void. I have looked through the Mutiny Act and the articles of war for the purpose of seeing whether they expressly limited the power of the commander-in-chief as to the persons upon whom the subordinate command is to be conferred; they are perfectly silent in that respect. If they are silent, then we are bound to look at the usage upon the subject, because that usage may assist us in forming our judgment. As to the usage, the evidence was (and it was matter of proof) that you cannot appoint a mere civil individual, by which mere civil individual I mean a person not having any military character. I take the reason of that to be this; that in him you would not expect to meet with that knowledge and those talents that a military command requires; but the evidence in the case is, that so as you do not appoint a civil individual, you are at liberty to appoint a military character, whether upon half pay, or whether upon full pay; and in substance I can see no reason for the distinction between the one and the other. You cannot appoint a civil individual because he will not have the competent skill and judgment, but a half-pay officer will be likely to have as much judgment as a full-pay officer, therefore I can see no reason why the power should not be conferred upon him as well as any other individual. The objection to that is, that by the words of the Mutiny Act there is no power to call to a court martial any person except such as shall be commissioned or in pay as officers. The decision of the Judges that a half-pay officer is not liable to a court *martial, applies, I apprehend, to *unemployed* half-pay officers only: they do not come within the words of the Mutiny Act, which describe such officers as are amenable to a court martial, viz. persons

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† See *Grant v. Sir C. Gould*, 3 R. B. 342 (2 H. Bl. 69) where it was held that a person “receiving pay as a soldier was subject to military

jurisdiction” [and see the definitions in the Army Act, 1881, s. 175, and the Army (Annual) Act, 1883, s. 9].

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contribute his skill and his judgment in the place in which for that skill and for that judgment he had been originally placed? I think it would be mischievous to the army if we were to hold, that because for purposes totally unconnected with that place, his regiment is disbanded, he should by that accidental circumstance be discharged from all obligation to perform military service in that place, and should be also deprived of the power and privilege of continuing that command until he should be regularly and properly superseded. The Crown exercises its judgment as to the persons, who from time to time shall have the command in particular places, and the person under the Crown entrusted with the care of the whole district, must from time to time say who shall be the person exercising the military command within particular parts of that district. How mischievous would it be if a man who had the command at a particular place in a critical situation were to cease to command immediately on receiving notice that his regiment, at a distance, was disbanded. The instant it is known that his regiment is reduced, the officer who commands upon the whole district may, if he shall think that is a reason why he shall be superseded, supersede him; he may direct that the command *shall devolve upon some other person, who will be the proper person to be delegated in that respect, but it would be mischievous if we were to say that the authority is, *ipso facto*, gone and at an end. I think what has been done afterwards with reference to this individual shews what was the sense of the Crown in that respect, and the sense of the Crown, unless it militates with the Act of Parliament by which the rights of the army are regulated, must determine the question. For these reasons it seems to me that the destruction of the defendant's rank in the York Chasseurs did not destroy the rights he had as commandant at Honduras, but that those rights continued; and if they continued, then the plaintiff was mistaken in point of law in supposing that the right had devolved upon him; and when he took upon him to issue an order in opposition to that which had been issued by the defendant, he was assuming that which the law did not entitle him to assume, and was liable to be placed in that situation in which the defendant placed him; and for these reasons I think the plaintiff is not entitled to

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BRADLEY v. ARTHUR. recover in this action, except upon the new assignment, and that the rule obtained for a new trial must be discharged.

HOLROYD, J.:

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I also think that upon the present occasion the justification of the defendant is made out in evidence. It appears to be admitted that at the time he was appointed, he was capable of receiving the appointment, and being capable of receiving the appointment, it appears to me, that although his military office in the York Chasseurs had ceased, he continued a military character sufficiently capable to hold the other *office. But it is urged that that would be attended with mischievous consequences. I must say that those consequences have not occurred to my mind. Then it is said, that this was a mere civil appointment. I think, as far as the power is to be taken to have been given by General Fuller, he had a right to exercise it. It was a military station. It arose from the commander-in-chief, and it was military and military only as it appears to me. Then as to the evidence of usage, I think, according to the case cited, such evidence was rightly received. But then it is urged, that the Crown had no power to grant to an officer abroad power and authority to grant commissions, or to enable them to receive appointments. By looking into the articles of war, particularly sections 18 & 22, it appears to be taken for granted that it is within the prerogative of the Crown, that not only the Crown itself, but also under certain circumstances, a governor may grant commissions and make appointments. In many cases it must be essentially necessary to the service that some person should be appointed in the interim, until confirmed or sanctioned by the Crown. Upon these grounds, I think that the present verdict ought in no respect to be interfered with. The rule for a new trial must therefore be discharged.

Rule discharged.

LITLEDALE, J. having been concerned in the cause while at the Bar gave no judgment.

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(4 Barn. & Cress. 319—325; S. C. 6 Dowl. & Ry. 364; S. C. at Nisi Prius, 2 Car. & P. 1.)

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A., who held an office for life, in the gift of B., agreed with C. to resign, and to procure the appointment for him, and C., in consideration thereof, agreed that A. should have a moiety of the profits. A. resigned, and through his influence C. was appointed, and executed a deed for the performance of the agreement. The agreement was not communicated to B. In covenant by A. against C. for not paying over to him a moiety of the profits of the office: Held, that the agreement was a fraud upon B., and therefore illegal and void.

COVENANT upon an indenture bearing date 15th of April, 1820, whereby defendant covenanted amongst other things, that he would during the joint lives of himself and the plaintiff render half yearly to the plaintiff, a just and true account of all such sums of money as he should actually receive, or as should come to his hands as bag-bearer or bag-man in the Pipe Office of his Majesty's Court of Exchequer. And also that the defendant should and would pay to or account with the plaintiff for the fees on all such Anglia accounts as were declared by the commissioners for auditing public accounts previous to the 1st of January then last past, and were then in the Pipe Office. And also should and would divide the net profits of the said office (except such fees as aforesaid,) equally between him, defendant, and the plaintiff, share and share alike. Breach, that the defendant had not accounted to the plaintiff for the monies which came to his hands, nor for the fees on the Anglia accounts, nor had divided with plaintiff the net profits of the office. Defendant craved oyer of the deed, which recited that James Farrer, Esq., as first secondary of the Pipe Office in the Exchequer, had constituted and appointed the defendant to be bag-bearer or bag-man in that office upon the resignation of the plaintiff, and that the plaintiff resigned the said office upon an understanding between him and the defendant, that the profits thereof, except the fees on the Anglia accounts, should thenceforth be divided equally between *him, plaintiff, and the defendant, during their joint lives, and then contained covenants by the defendant for performance of the agreement. Pleas, first, *non est factum*.

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Second, that before and at the time of making the indenture, the plaintiff had held, exercised and enjoyed the place, situation, and office of bag-bearer or bag-man in the Pipe Office of his Majesty's Court of Exchequer, the same then and still being an office touching and concerning the administration of justice, to wit, at, &c. ; and the defendant further saith, that heretofore, to wit, on, &c., at, &c., it was unlawfully, corruptly, and against the form of the statute in such case made and provided, agreed by and between the plaintiff and defendant, that the plaintiff should resign his said office of bag-bearer or bag-man as aforesaid in favor of defendant ; and that plaintiff should procure defendant to be appointed to the said office on the said resignation upon certain unlawful terms and agreement, to wit, that the profits of said office (except the fees and profits on such Anglia accounts as were declared by the commissioners for auditing public accounts previous to the 1st day of January then last past, and were then in the said Pipe Office), should thenceforth be divided equally between plaintiff and defendant during their joint lives, and that defendant should enter into the said covenants on his part in the said indenture contained ; and defendant further saith, that the said unlawful and corrupt agreement having been so made as aforesaid, afterwards, to wit, on, &c., at, &c., in pursuance thereof the plaintiff did relinquish and give up the said office in favor of defendant, and did then and there procure defendant to be appointed to the said office, upon the said resignation, and in lieu and stead of plaintiff, and *upon the terms and agreement aforesaid. And for securing the payment of the said moiety of the said fees of the said office of bag-bearer or bag-man as aforesaid, to be paid to him, the plaintiff, by defendant, during their joint lives ; defendant then and there, to wit, on, &c., at, &c., did seal, and as his act and deed, deliver the said supposed indenture in the declaration mentioned, and plaintiff thereupon then and there received of and from defendant the said supposed indenture in the declaration mentioned, whereby the said supposed indenture was and is utterly void in law. The third plea varied from the second only, in describing the office as one "touching and concerning the receipt of his Majesty's revenue." The fourth plea omitted all

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description of the office. Fifth plea, that before the making of the said indenture in the declaration mentioned, to wit, on, &c., at, &c., the plaintiff had been and was bag-bearer or bag-man in the Pipe Office in his Majesty's Court of Exchequer, and which said office of bag-bearer or bag-man then and there was a public office and employment, and the plaintiff then and there proposed to defendant that he would resign his said office, and procure defendant to be appointed to the said office on the terms in said indenture contained. And defendant further saith, that upon such resignation the privilege and right of appointing a succeeding bag-bearer or bag-man in lieu of the plaintiff, belonged to James Farrer, Esq., to wit, at, &c., and thereupon heretofore, to wit, on, &c., at, &c., it was without the privity, knowledge, or consent of the said James Farrer, corruptly, unlawfully and deceitfully, and contrary to the statute in such case made and provided, agreed between the plaintiff and defendant, that the plaintiff should relinquish *his said office in favor of defendant, and by recommending the defendant to the said James Farrer, as a fit and proper person to succeed him, the said plaintiff, in the same office, and by other subtle means and devices should cause and procure the said James Farrer to constitute and appoint the said defendant to be bag-bearer or bag-man in lieu or stead of the said plaintiff upon his resignation; and that, for such corrupt and unlawful considerations, and in order to secure to the plaintiff the moiety of the profits as in the indenture mentioned, he, the defendant, should make and seal, and as his act and deed, deliver the said indenture to and in favor of the plaintiff. And the defendant further saith, that afterwards, to wit, on, &c., at, &c., he, in pursuance of that unlawful agreement, did make and seal, and as his act and deed, deliver to and in favor of plaintiff, the said indenture in the declaration mentioned, whereby and on account whereof the said indenture was and is wholly void in law, &c. Sixth plea, that the indenture in the declaration mentioned was obtained and procured from the defendant by fraud, covin, and deceit of plaintiff. Replication, similiter to general issue. To the second plea, that the office of bag-bearer is not an office touching or concerning the administration of justice. To the third plea, that it is not an office

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touching or concerning the receipt of his Majesty's revenue. To the fourth plea, protesting that the plea is bad, and that the indenture was made for a good and legal consideration, and not in pursuance of, or upon the supposed unlawful agreement in that plea mentioned, saith that the said place, situation, and office of bag-bearer or bag-man in the Pipe Office of his Majesty's Court of Exchequer in the fourth plea mentioned, before and at the time of *making the said supposed agreement in that plea mentioned, and before and at the time of making the said indenture in the declaration mentioned, was and is an office in the gift of the person possessed of the office of first secondary in the Pipe Office in the said last mentioned Court for the time being, by virtue of his said office, the said office of first secondary then and still being an office held under an appointment for the life of the person holding the same ; and that before and at the time of the making the agreement in the fourth plea mentioned, and before and at the time of making the indenture in the declaration mentioned, one James Farrer, Esq., was and still is a person possessed of the office of first secondary in the Pipe Office in the said last mentioned Court under an appointment for his life ; and that upon the resignation of plaintiff of the said place, situation, and office of bag-bearer or bag-man as in the fourth plea mentioned, the said situation and office of bag-bearer or bag-man was in the gift of said James Farrer, by virtue of his said office of first secondary so by him possessed as aforesaid, to wit, at, &c. And plaintiff further saith, that the said place, situation, and office of bag-bearer or bag-man was legally saleable before the passing of a certain Act of Parliament made and passed in the 49th year of the reign of his late Majesty King George the Third, intituled "An Act for the further prevention of the sale and brokerage of offices ;" and that the said agreement in the fourth plea mentioned, if any such were made, was made by and with the full knowledge, privity, and consent of said James Farrer. To the fifth plea, that it was not without the privity, knowledge, or consent of James Farrer, corruptly, unlawfully, and deceitfully, and contrary to the statute, *agreed between plaintiff and defendant as in that plea alleged. To the sixth plea, that the indenture was obtained by the

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plaintiff from the defendant fairly and honestly, and not by the fraud, covin, or deceit of the plaintiff. Rejoinder took issue upon the replication to the second, third, fifth, and sixth pleas; and to the fourth said, that the agreement in the fourth plea mentioned was not made with the full knowledge, privity, and consent of the said James Farrer, but without his knowledge, privity, or consent. Issue thereon. At the trial before Bayley, J., at the second sittings for Middlesex, in Easter Term, the first, second, third, and last issues were found for the plaintiff, the fourth and fifth for the defendant. No motion was made in the cause in Easter Term, in consequence of some misunderstanding as to what took place at the trial, and upon application to the learned Judge, he being of opinion that the finding of the jury on the fourth and fifth issues was an answer to the action, gave the plaintiff leave to treat the case as if he had been nonsuited; and in pursuance of that permission

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Denman now moved for a new trial:

It was not incumbent on the plaintiff to communicate to Mr. Farrer the agreement entered into between himself and the defendant. No misrepresentation was made to Mr. Farrer as to the defendant's fitness for the office of bag-bearer. It was his voluntary act to appoint the defendant at the request of the plaintiff, and it seems difficult to understand how he can be affected by a private arrangement between those two persons.

ABBOTT, Ch. J. :

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I am of opinion that we ought not to grant a rule in this case. Putting out of consideration all question as to the nature of the office, I think that the issues found for the defendant are an answer to the action, or rather that the plaintiff should have been non-suited for want of proof that the bargain was made with the privity and consent of Mr. Farrer. The office was in the gift of that gentleman, and had he known that the effect of appointing the defendant would not be to give him the emoluments of the office, but to divide them between him and the plaintiff; it is probable that he might have exercised his right of patronage in a different mode; it appears to me, therefore,

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that this secret agreement was a fraud upon Mr. Farrer, and void in law.

Denman then urged that the finding of the jury on the fourth and fifth issues was against the weight of evidence, and also produced affidavits to shew that the agreement was made known to Mr. Farrer, but the COURT expressed themselves satisfied with the verdict on those issues.

Rule refused.

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BOSC v. SOLLIERS.

(4 Barn. & Cress. 358—360; S. C. 6 Dowl. & Ry. 514; 3 L. J. K. B. 248.)

By the jurat to an affidavit of debt made by a foreigner, it was certified by the signer of the bills of Middlesex that the affidavit was interpreted by J. C., professor of languages, (he having first sworn that he understood the English and French languages,) to the deponent, who was afterwards sworn to the truth thereof: this was held to be sufficient.

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A RULE *nisi* had been obtained, calling upon the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled on the defendant's filing common bail. The affidavit of debt purported to be signed by the plaintiff; and there was the following *memorandum annexed to it: "This affidavit was interpreted by Francis Chauvet, of, &c., in the county of Middlesex, professor of languages, (he having first sworn that he understood the English and French languages,) to the deponent, who was afterwards sworn to the truth thereof, at, &c., in the said county, before me, E. J. BODDY, deputy-signer of the bills of Middlesex."† The rule was obtained on the ground that it did not appear in the jurat either that the person who made the affidavit of debt understood either the French or English language, or that the interpreter was sworn duly to interpret the oath and affidavit. It now appeared by an affidavit of Boddy, produced by the plaintiff, that the jurat was written by him, as had been usual and customary on all such

† The usual form of jurat in a similar case would now appear to be: "Sworn at, &c., through the interpretation of, &c., he having first sworn that he had truly and faithfully interpreted the contents of this

affidavit to the deponent A. B., and that he would faithfully interpret the oath about to be administered unto him, the said A. B. Before me, &c." See the Annual Practice, 1897, p. 1266.—F. P.

occasions for a period of eight years during which he had been in the office, and in the constant habit of taking such affidavits.

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E. Lawes now shewed cause :

This jurat is in the form commonly used on such occasions. In the case of a marksman, the commissioner taking the affidavit, or signing the jurat, certifies that it was read in his presence to the party making the same, who seemed perfectly to understand it, and made his mark in the presence of the commissioner. In that case, therefore, the Court is satisfied by the certificate of the commissioner, that the party understood the matters of the affidavit. So here the Court ought to be satisfied by the certificate of the signer of the bills of Middlesex, that the party was duly sworn to the contents of the affidavit.

Campbell, contra :

It lies upon the plaintiff to produce to the Court an affidavit disclosing such circumstances *as shew that the defendant was duly held to bail. It must appear, therefore, that the plaintiff has sworn to the matters contained in the affidavit. Now giving full credit to all the facts stated in the jurat, that does not appear. It appears that the plaintiff was a foreigner, and it ought therefore to be shewn that the oath and the matters of the affidavit were duly interpreted to her. It does not appear that the plaintiff either understood the French language, or that the interpreter was sworn to interpret the affidavit to her.

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ABBOTT, Ch. J. :

This jurat is in the common form used in all similar cases, and I think it contains sufficient matter from which the Court may reasonably infer that this affidavit has been duly sworn. It alleges that the affidavit was interpreted to the deponent. Now, that could not be unless the interpreter and the deponent understood one and the same language. If the certificate were defective in this respect, I think such defect might be supplied ; but I think we are bound to trust the officer of the Court, and to suppose that he exercises a sound discretion in the discharge of his duty ; when, therefore, he certifies to us that the affidavit was interpreted by a person who swore that he understood the

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French and English languages, and that the deponent swore to the truth thereof, we must intend that the person making the affidavit understood the same language as the interpreter; and that the latter was sworn well and truly to interpret the oath and the matters of the affidavit. This rule must therefore be discharged.

Rule discharged.

1825.
June 18.
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THE KING v. HUGHES.

(4 Barn. & Cress. 368—380; S. C. 6 Dowl. & Ry. 443; 3 L. J. K. B. 249.)

Information in the nature of a *quo warranto* for usurping the office of Mayor of Monmouth. Plea that defendant was duly elected according to the governing charter of the borough. Replication that there were two candidates; that 50 good votes, tendered for the losing candidate, were improperly rejected; and that 38 persons, who had been unduly elected, and admitted as burgesses, were received as voters for the defendant, and that a majority of the legal votes tendered was in favor of the other candidate. On demurrer, held that the replication was bad, for that it was only an argumentative and not a direct denial of the validity of the defendant's election, and also for that it attempted to put in issue the title of the electors (corporators *de facto*), which cannot be done in an information against the elected.

INFORMATION in the nature of a *quo warranto*, against the defendant for usurping the office of mayor of the town and borough of Monmouth. The defendant's plea set out a charter granted to the town and borough of Monmouth, by Edw. VI. in the 3rd year of his reign, averred acceptance, and that it was still the governing charter of the borough; and that defendant was elected and sworn mayor according to the directions of the charter. There were two other pleas similar in substance, and a fourth plea setting out a non-existing bye-law made to regulate the election of mayor, and that the defendant was elected according to that bye-law. To these pleas there were 31 general replications, taking issue upon the various facts alleged in the pleas. Then followed a special replication, that at the said meeting of the said burgesses, of the said town and borough, held on, &c., for the choosing of a mayor of the said town and borough, as in the 1st plea mentioned, two several candidates were duly nominated and proposed for the office of mayor of the said town and borough, to wit, one Robert Bevan, then and there

being a burgess of the said town and borough, and being then and there a fit and proper person to be such mayor, and the said Henry Hughes ; and that afterwards, and after such nomination and proposing of the said Robert Bevan, and of *the said Henry Hughes, to wit, on, &c., at, &c., a poll of the votes for the said respective candidates was then and there demanded, and was then and there granted by T. G. Phillpotts, acting as mayor of the said town and borough, and presiding at the said meeting. And the said coroner further saith, that divers of the burgesses of the said town and borough, to wit (here 50 burgesses were named,) having a right to vote in the said election of mayor of the said town and borough, attended and were present at the said last-mentioned meeting, as such burgesses as aforesaid, and then and there tendered and offered their votes respectively for Bevan, to be such mayor of the said town and borough, to Phillpotts, then and there acting as mayor of the said town and borough, and the presiding officer of such meeting. And the said coroner further saith, that the said (fifty persons) so offering and tendering their votes for Bevan were rejected by Phillpotts, and were not reckoned as voters, and that divers, to wit, (here thirty-eight other persons were named,) of the said supposed burgesses in the first plea stated to have been met and assembled together, and to have chosen the said Hughes to be mayor as aforesaid, had been theretofore, to wit, A. B. &c. on the 17th day of July, 1820, C. D. &c. on the 20th day of July, 1820, E. F. &c. on the 4th day of Dec. 1820, G. H. &c. on the 18th day of June, 1821, and I. K. &c. on the 10th day of Feb., 1823, respectively, illegally chosen to be burgesses at certain pretended corporate meetings of the said burgesses, on those respective days, and had under and by color of the said illegal elections, and with no other right or title been severally admitted as burgesses of the said town and borough, and that the said (thirty-eight *persons) then and there not being legal burgesses of the said town and borough, and then and there having no legal right to vote as burgesses at the said election of mayor, tendered their votes for Hughes, were objected to by J. P. a burgess, as persons having been improperly and illegally admitted burgesses of the said town and borough, and as having no legal right to vote as last aforesaid,

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and were, notwithstanding such objections, severally and respectively admitted by Phillpotts, then presiding as mayor, to give their votes for and on behalf of Hughes, and did give their votes for and on behalf of Hughes, and the same were then and there received and reckoned as votes for Hughes. And the said coroner further saith, that the major part of the burgesses so met and assembled and present at the said last-mentioned meeting, who had a right to vote, and ought to have been admitted and received as legal voters at such election respectively, voted and tendered their votes for Bevan to be such mayor as last aforesaid; and Bevan had then and there a majority of legal votes in his favour to be such mayor as last aforesaid, and then and there ought to have been declared and sworn in as such mayor; and this the said coroner is ready to verify, &c. There were other replications similar in substance. The defendant joined issue upon the general replications, and demurred to the others, assigning as causes of demurrer, "that the same several replications do not directly deny or traverse any of the matters contained in the same several respective pleas of the said H. Hughes, nor confess and avoid the same; and also for that the same several respective replications do not *directly answer the same several respective pleas, or any of them, but respectively are, at most, argumentative answers thereto; and also for that the same several respective replications are multifarious and double; and also for that the said several respective replications do not contain any matter upon which pertinent and conclusive issues can be taken; and also for that the same several respective replications contain matter of evidence, and not of allegation, and that all the matters contained in the said several respective replications might be given in evidence, under the issues before joined, between the parties aforesaid; that the said several and respective replications lead to great and unnecessary prolixity of pleading, and are, in other respects, evasive, argumentative, insufficient, and informal." Joinder in demurrer.

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Campbell, in support of the demurrer :

The special replications in this case are clearly bad, both in form and substance. It was impossible for the defendant to

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take any issues upon them. They are all in effect the same; it will therefore be sufficient to comment on the first. If the defendant had rejoined, and said that the fifty votes rejected were bad, and that had been found against him, it would not have followed that he was improperly elected. So, if upon an issue that the thirty-eight votes mentioned in the replication were not bad, they had been found to be so, still the defendant might have had a majority of good votes. Or if the concluding allegation in the replication, viz., that Bevan had a majority of good votes had been denied, that would have admitted the fifty to be good, and the thirty-eight *bad. But, in fact, the replication admits the thirty-eight to be good votes; for it states the parties to have been corporators *de facto*, and their titles cannot be impeached in this mode. There are only two cases bearing on the question: *Symmers v. Regent*† and *Rex v. W. Smith*.‡ In the former, which was a writ of error from the Court of K. B. in Ireland, one question was, whether, on the trial of the right of the elected to a corporate franchise, the rights of the voters to their corporate franchise could be gone into? The case was twice argued: at the close of the first argument Lord MANSFIELD said, “The general question has never been fully settled, though it has been touched upon in many cases. But this is settled, that no corporator is bound by surprise to go into the original qualification of any corporator in possession, who voted for him at his election, especially without notice.” After the second argument, his Lordship said, “As to this point, the proposition is, that the Judge on this information should have done exactly what he ought to have done if the title of these persons, who were common councilmen *de facto*, had actually been in question before him upon *quo warranto*. They were *de facto* members of the corporation, admitted, sworn, and in the actual enjoyment of the office. The question is, whether the Judge collaterally at the trial ought to have gone into the validity of these men’s titles? Could the mayor have gone into it at the election? I am very clear he could not.” That is an express authority that the replications are bad as to the thirty-eight votes, alleged to have been

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† Cowp. 489.

‡ 5 M. & S. 271.

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*improperly received, for the replications themselves admit that they were corporators *de facto*. *Rex v. W. Smith* was an information for exercising the office of Mayor of Colchester. There were three issues : 1st, whether the then Mayor and the major part of the residue of the aldermen elected the defendant ; 2ndly, whether he duly took the oaths ; 3rdly, whether one Hedge, who at the election presided and acted as Mayor, was then Mayor. Lord ELLENBOROUGH, in giving judgment, says, " As to the question, whether it is competent to impeach upon a collateral issue concerning the rights of the elected, the title of the voter, if the case had turned upon it I should have desired further time for consideration. The language of Lord MANSFIELD in *Symmers v. Regem* is certainly very strong ; but, upon the competency to enquire into the validity of the election of Hedge, the presiding officer at the defendant's election, I cannot entertain a doubt." And the present LORD CHIEF JUSTICE, as to the first issue, said he thought the case not distinguishable from *Symmers v. Regem*. Those two authorities are decisive against the replications in this case, and the rule laid down in them is very reasonable, for if, in trying the right of the elected, the title of every voter might come in question, it might have been incumbent on the defendant to take a distinct issue as to each voter mentioned in the replication ; and then no Judge or jury could have been found capable of going through the investigation.

G. R. Cross, contrà :

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The special replications are good, both in form and substance. The substantial question certainly is, whether the relator can question the title of the electors, when investigating that of the elected. *This question is now presented, for the first time, upon the record. In *Rex v. Latham*,† the question was discussed upon a motion for a *quo warranto* information, the rule was made absolute on other grounds, and as to this point Lord MANSFIELD said, " There is no instance of precluding the Crown from insisting upon any objections that they shall be advised to take issue upon in order to shew the defendant to have usurped the

† 3 Burr. 1485.

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franchise. Therefore, we neither need to give, nor should give any opinion upon the other points, nor does the line seem to be fully and clearly drawn and fixed where the rights of the electors can be gone into at all, or how far they can be gone into on the trial of the right of the elected." *Symmers v. Regem* cited on the other side was the next case where the point was raised. There the title of the electors was to a certain extent investigated, for it having been proved that some of them were removed from their corporate rights, evidence of their restoration was admitted; then evidence was tendered to shew that those persons were originally improperly elected, that evidence was rejected, and Lord MANSFIELD thought that the titles of electors could not be investigated, unless notice of the objection were given, either on the record or collaterally; particularly as they had been long in possession of their franchises. Here the objection is stated on the record, and the names of the various voters were introduced in order to obviate the objection taken to the inquiry in that case. In *Rex v. Mein*,† Lord KENYON alludes to *Symmers v. Regem*, and observes, that there, in deciding that the right of the *electors could not be disputed, "Lord MANSFIELD laid considerable stress on the voters having been in the possession of their franchises for twelve years." The last cited case was decided in E. T. 30 Geo. III., and in the 32 Geo. III. c. 58, an Act was passed "for the amendment of the law in proceedings upon information in nature of *quo warranto*." By the 3rd section it was enacted "That if any person or persons against whom any such information shall be exhibited, shall derive title under an election, nomination, &c., by any person or persons, the title of such person or persons against whom such information shall be exhibited shall not be defeated or affected by reason or on account of any defect in the title of such person or persons so electing, nominating, &c., in case such person or persons, under whom title shall be derived as aforesaid, was or were in exercise *de facto* of the franchise or office in virtue of which he or they was or were so elected, nominated, &c., at a period six years at least previous to the time of filing such information, and his or

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† 3 T. R. 596.

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their title shall not have been questioned by any legal proceeding carried on with effect." The 1st section had provided that the titles of corporate officers shall not be impeached directly by *quo warranto* after six years; it was therefore reasonable to protect them after that time from being questioned indirectly; but this 3rd section would have been altogether unnecessary if before that time the law had been, that the title of electors could not be disputed in an investigation of the title of the elected. Here the defendant might have rejoined that the voters objected to had enjoyed their offices for six years before the election. *Rex v. Smith* was determined on another ground, and cannot in this case be considered as an authority either way; but there are two *more ancient cases in which the title of electors was inquired into without objection: *Foot v. Prouse*.†

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(BAYLEY, J. : The question there was not as to the original title of the elector, but as to the duration of his office; he would at the same time cease to be a corporator *de facto et de jure*.)

Still the question tried was, whether at the time of the election the voter was a corporator *de jure*. And in *Rex v. Hebden*,‡ the defendant as bailiff of Scarborough made title as elected under the bailiffship of Batty and Armstrong, and upon issue joined, whether they were bailiffs or not, a record of a judgment of ouster against them was read in evidence, and upon motion for a new trial it was held that it was properly admitted. If then the question can be entered into, the replications are good in substance; they are good in form also: the relator was obliged to introduce into them the rejected votes, otherwise the result would not have arisen, viz. that Bevan had the majority of legal votes tendered for him. Nor can this be complained of as leading to an infinity of issues; according to *Symmers v. Regem*, the relator had a right to enter into the rejected votes, and the insertion of their names in the replications gave the defendant a great advantage, as he would be thereby enabled to prepare himself with evidence respecting them.

† 1 Str. 625.

‡ 2 Str. 1109; Andr. 389.

BAYLEY, J. : †

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To this information filed against the defendant for usurping the office of mayor of Monmouth, he has pleaded that he was elected according to the provisions of the governing charter of the borough. The prosecutor might have replied *non debito modo *electus*. He does not do that, but alleges that 50 votes tendered for another candidate were improperly rejected, and 38 tendered for the defendant were improperly admitted, and that a majority of the legal votes tendered was in favour of Bevan the losing candidate. That is merely the conclusion, that the defendant was not duly elected. That was the only proper issue to be taken, and would have raised every question competent to the prosecutor upon this record. In *Rex v. Mein*, Lord KENYON held, that where the electors do not fill a corporate office it is allowable to enter into their titles, in questioning that of the elected, because there is no other mode of doing it. But a distinction has long been recognized between such cases and those of corporators; the titles of the latter must be impeached in a different mode, and this is the first instance in which their claim to be corporators *de jure* has been attempted to be brought in question by this form of pleading. Nothing could be more mischievous than such a proceeding, for the length of time which would be consumed in such an investigation would render it impossible to have a legal trial. The case of *Rex v. Latham* does not throw any light upon the question; Lord MANSFIELD there treats it as quite undecided. *Rex v. Hebden* differed materially from this case; there the question was upon the right of persons filling a particular office, in virtue of which they were to nominate the candidates, and that case does not shew that the title of the electors may be investigated, but that at most you may shew the question to have been before determined, as in that case, by a judgment of ouster in a *quo warranto*. In *Symmers v. Regem* the issue was, “not duly elected,” and upon that issue every thing may *be brought in question which can be investigated in such a proceeding. If a prosecutor were at liberty to shew that any one had voted who was not duly qualified, the result would be that the party was not duly

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† Abbott, Ch. J. was absent.

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electd. The defendant in that case was therefore entitled to give any matter in evidence which would be open to the defendant on this record, and there it was held that he could not give evidence to impeach the votes of corporators *de facto*. In *Rex v. Mein*, Lord KENYON (who is a very high authority upon such points), says, "It is objected that the titles of electors cannot be impeached through the medium of the elected, and the case in Cowper has been relied on, but there the electors were members of a corporation whose titles might have been questioned in *quo warranto* informations." He therefore recognizes *Symmers v. Regem*, and takes a distinction between that case and *Rex v. Mein*. These cases were before the 32 Geo. II. c. 58, and I certainly do not think that by the 3rd section of that Act it was intended to extend the power of objecting to the titles of corporators, and perhaps it was meant to be applicable to head or presiding officers, although that is certainly made doubtful by the introduction of the word "election." *Rex v. Smith* stands upon a different footing. The defendant had been elected mayor of Colchester at a meeting holden before one Hedge, and unless Hedge were at the time mayor *de jure*, there could not be a good corporate meeting, consequently it was open to the prosecutor to question his title. Upon the whole therefore, inasmuch as the object of these replications was to rest the prosecutor's case upon the liability of certain voters to ouster at the time of the election, and as according to the rule of law, which has been considered *as settled ever since the decision of *Symmers v. Regem*, that question cannot in this proceeding be entered into, it appears to me that the replications are bad, and that our judgment must be for the defendant.

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HOLROYD, J. and LITLEDALE, J. [concurred, resting their judgments chiefly upon the form of the pleadings].

Judgment for the defendant.

MORDY *v.* JONES.

(4 Barn. & Cress. 394—400; S. C. 6 Dowl. & Ry. 479; 3 L. J. K. B. 250.)

1825.
June 21.

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In an action on a policy of insurance on freight it appeared, that the ship in the course of her voyage having been injured by a peril of the sea, was obliged to put into a port and land the whole of her cargo. Part of the cargo had been so wetted by sea water that it could not be reshipped without danger of ignition, unless it went through a process which would have detained the vessel six weeks, and have been attended with expense equal to the freight. Under these circumstances the master sold these goods, and finding he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo. The master's proceedings were such as a prudent man uninsured would have adopted: Held, that the underwriters were not liable for the loss of the freight of these goods.

THIS was an action on a policy of insurance subscribed by the defendant on the 10th of February, 1821, for 250*l.* on the freight of the ship *Isabella*, at and from Kingston in Jamaica to Liverpool. The cause was referred to the arbitration of Campbell, who stated the facts of the case upon his award. On the 1st of February, 1821, the vessel sailed from Kingston, on the voyage insured, having on board a cargo of cotton, coffee, sugar, hides, and other goods, shipped by various persons for consignees in England, with bills of lading in the usual terms; but a plank having started in violent weather, the ship was obliged to put back to Kingston, when, after a survey, it was found necessary to land the whole of the cargo. This was, therefore, done, and the accident was repaired, but part of the *cargo had been so wetted by sea water, in consequence of the starting of the plank, that it could not be reshipped without danger, from ignition, to the ship and the rest of the cargo, unless it underwent a process of washing with fresh water, and then drying in the sun, which would have detained the vessel six weeks, and been attended with expense equal to the freight. Under these circumstances, the shippers of these goods refusing to interfere, but approving of a sale by the master, the master sold them, and finding he could not obtain other goods to complete his cargo in any reasonable time, and being pressed by the shippers of the rest of the cargo to proceed, he sailed for Liverpool, carrying with him the net proceeds of the damaged part of the cargo. On

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arrival at Liverpool, he paid over these proceeds to the parties interested without retaining the freight of the goods sold. The master's proceedings in Kingston were such as a prudent man, uninsured, would have adopted. The arbitrator found that there was such a loss of freight of the goods so sold as entitled the plaintiff to recover, and in Hilary Term,

F. Pollock was called upon to support a rule which he had obtained for setting aside the award :

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The question raised is of the first impression, and certainly is one of great importance, as by the decision of the arbitrator, the underwriter was made liable to a total loss of freight, the goods being only partially injured, and requiring only delay, and the ship continuing capable of earning the freight. An insurance on freight is a peculiar contract, and does not admit of a partial or average loss. Such a claim has never been recognized. The insurance on freight is an insurance depending *on both ship and goods, and is independent of any partial loss of either. The underwriter on freight cannot be called upon to contribute to the repair of the vessel, to enable her to earn the freight, nor to the expences incurred in relation to the goods, in order that they may be carried forward. His liability arises only upon a total loss of one or other of the subjects (ship and goods) insured in this qualified way. It is true, the total loss may be actual, as by the ship or goods going to the bottom of the sea ; or constructive, as where a ship is so injured as not to be worth repairing, or goods are so damaged as to be incapable of being carried on ; but that was not the case in this instance. The ship was repaired and completed ; the voyage and the goods were capable of being forwarded, after a certain process, and they required only a little time and expence. It might not have been worth while for the captain to wait for this particular quantity of goods ; but the underwriter on freight does not guarantee that the freight shall be worth earning ; but merely, that neither the ship nor the goods shall be reduced, by the perils insured against, to such a state, that the freight *cannot* be earned. The case of *Milles v. Fletcher*† will perhaps be relied on by the plaintiff ; but, in that

† Doug. 231.

case, there was a constructive *total* loss of the vessel, and the admitted consequence of that is, that the underwriters on freight are liable. It is clear, that if the vessel alone had been injured, but capable of repair, the underwriter on freight would not have been liable, if the owners of goods had refused to wait till the ship was repaired, and had taken their goods forward in other vessels. So, if the vessel *had been uninjured, but all the goods damaged, so as to require a delay, which would consume in expences all the freight to be earned, the master could not have sailed without the cargo, and have called on the underwriters for a total loss. The same principles apply to this case where part of the cargo has been damaged. The ship continued able to take the goods; and, after the process of washing, the goods were capable of being taken; but it was more convenient not to wait for them. Then shall the underwriter on freight be liable? To decide so, would be to make him liable for every damage, and enable the master to turn such damage into a total loss, in every case where his interest required it.

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Park, contra:

The assured claim a total loss of the freight of part of the goods; and, in order to recover, it is admitted they must establish, first, that there has been a total loss of that freight, and, secondly, that it was occasioned by perils of the sea. As to the first point, it is clear that no freight was earned, for the goods were not carried on the voyage. The only question is as to the second point, whether the loss was occasioned by the perils of the sea. The ship and cargo were both injured by those perils, and the consequence was, the loss of this freight: for it is an established rule in the law of marine insurance, that when a peril insured against has occurred, the underwriters are liable for a loss arising from the act of the assured or his agent, the master conducting himself, in consequence of that peril, as a prudent man uninsured would have done. Such a loss is to be considered as caused by the original peril. That is laid down by *Lord MANSFIELD, in *Miles v. Fletcher*.† The case itself is in point, for that was an insurance on the freight, as well as on the

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† Doug. 231.

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ship. A peril insured against happened by capture, and the question was, what was the loss sustained in consequence of that peril? and it was decided that the loss of the freight, which was directly occasioned by the act of the captain, in selling the cargo and leaving the ship behind, was a consequence of the peril insured against. The same rule is laid down and exemplified in the case of *Green v. The Royal Exchange Assurance Company*.† This rule, therefore, must be considered as completely established; and it is a reasonable rule, for no other will give a complete indemnity to the assured. The underwriters on freight must be taken to have understood, on subscribing the policy, that the assured, whenever a loss happened, would conduct himself fairly, as if uninsured, with reference to the interest of all concerned; and not that he would attend exclusively to those of the underwriters on freight, and incur an unwarrantable expence for the purpose of earning it. Two supposed cases have been put on the other side: one, of the ship being damaged, and the goods taken back by the owners; another, of the goods being so damaged as to require a delay which would cost more than the value of the freight. The answer to the first case is, that it is not possible to conceive that a prudent man, uninsured, would have given back the goods, without receiving freight; and to the second, that if such a person could have left the goods behind, the underwriters would be liable. It is admitted on the other side, that there may be a total loss of freight to charge the underwriter, though the ship *is not lost; as if she be not worth repairing: and yet it might be said in that case, as well as this, that the underwriter on freight had nothing to do with the repairs of the ship; and that the loss was occasioned by the default of the assured, in not incurring the expence of a repair, as it was said to be incurred in this, by his not choosing to incur the expence of delay. The only reasonable rule, which will secure a full indemnity to the assured, is, that a loss occasioned by acts such as, in the ordinary course of affairs, are adopted in consequence of the peril, is a loss occasioned by that peril, and that the underwriters are liable for it.

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† 16 B. R. 571 (6 Taunt. 68; 1 Marsh. 447).

F. Pollock in reply :

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It would be very dangerous to give the master the power of deciding whether it was the interest of all parties not to wait. In the cases of insurances on ship and goods, or both, as the underwriter is liable for repairs of the ship, or for damage to the goods, the master may safely be entrusted with a discretion not to repair, and treat it as a total loss, if the repairs would be more than the value of the vessel, or the damage to the goods leaves nothing worth preserving ; but the reason wholly fails, as applied to an insurance on freight, upon which a partial loss creates no claim ; and it would be most dangerous to leave it to the discretion of the master, who would have to decide, not whether the underwriters on freight should be liable for a total or partial loss, but whether he should be liable at all or not.

Cur. adv. vult.

The judgment of the COURT was now delivered by ABBOTT, Ch. J., who after stating the facts of the case, *proceeded as follows :— [*400]

The question was, whether under these circumstances the underwriter was answerable *pro tanto* for the freight of these goods, thus relanded and left behind ? and there appears to be no case or decision exactly in point, and yet such an occurrence must probably have happened many times, and upon the whole we are of opinion, that the underwriter was not liable for the freight of these goods. It may be very true, that the most prudent thing for the master of the ship might be to leave the goods behind, and sail without them ; but it does not, therefore, follow that the underwriter is to make good the freight thereby lost. If it should be held in a case of this kind, that the underwriter would be liable to make it good, it would open a temptation to a master of a ship to sail away under circumstances like these, instead of stopping until the goods could be reshipped, which would be very mischievous. We think inconvenience would result by laying down a rule which should make the underwriter answerable in a case of this kind. It is very proper that the master should exercise a discretion whether it be more fit to leave the goods behind, and give up the value of the freight, than

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to bring them home. But it by no means follows as a consequence that if he does in the sound exercise of his discretion leave part of the goods behind, and his owner thereby loses freight *pro tanto*, that he can throw that loss on the underwriter. This being the opinion of the Court, the rule must be made absolute for setting aside the award.

Rule absolute.

1825.
June 21.

HARRIS v. SAUNDERS.†

(4 Barn. & Cress. 411—418; S. C. 6 Dowl. & Ry. 471; 3 L. J. K. B. 239.)

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A judgment obtained in one of the superior Courts in Ireland since the Union is not a record in England, but is, in effect, a foreign judgment.

ASSUMPSIT on a judgment obtained in Hilary Term, 1821, in the Court of Common Pleas in Ireland. The plaintiff having obtained a verdict, a rule *nisi* had been obtained for arresting the judgment, upon the ground that since the Union assumpsit would not lie on any such judgment.

Marryat and Selwyn shewed cause :

Assumpsit is maintainable on a foreign judgment: *Crawford v. Whittall*,‡ *Bowles v. Bradshaw*,§ *Plastow v. Van Uxem*.|| The question is, whether since the Act of Union a judgment obtained in Ireland is a record of this country. By the Act of Union, 39 & 40 Geo. III. c. 67, “all laws in force at the time of the Union, and all Courts of civil and ecclesiastical *jurisdiction within the respective kingdoms, shall remain as now by law established within the respective kingdoms, subject only to such alterations and regulations, from time to time, as circumstances appear to the parliament to require.” Since the Union with Scotland and Ireland assumpsit has been frequently brought on Scotch decrees and on Irish judgments. In *Vaughan v. Plunkett*¶ assumpsit was brought in this country on a judgment obtained

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† The Judgments Extension Act, 1868 (31 & 32 Vict. c. 54) alters the mode of procedure, but does not affect the principle of this decision.—R. C.

‡ Doug. 4.

§ Doug. 5.

|| *Ibid.*

¶ 3 Taunt. 85.

in the Court of Exchequer in Ireland, and CHAMBER, J. reserved the point, whether since the Union a judgment obtained in Ireland was a record, but the defendant acquiesced in the verdict found against him. In *Collins v. Lord Mathew*† the question was not decided. The Court gave judgment on the ground that the plea ought to have concluded to the country. But, assuming that debt may be maintained, it does not follow that assumpsit will not lie. It is not necessary to bring debt in this country on a recognizance of bail taken in Ireland. The practice of bringing actions of debt upon such recognizances, probably arose from the necessity of suing in that mode upon recognizances in the nature of statute staple which are under seal. Debt lies on all contracts for the payment of money, but assumpsit lies on almost any such contract. The antecedent liability on the judgment is a good consideration for a promise. If it be a record, still it is to be proved before a jury by a copy: *Collins v. Lord Mathew*.† A plaintiff, therefore, is at liberty to declare either in assumpsit or in debt.

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Evans, contra :

Debt is the proper form of action on a record: Comyn's Digest, tit. Debt, A. 2. It lies upon *a judgment given in a foreign Court. But in that case the judgment is not a specialty, and the grounds of it may be shewn and impeached by the defendant. The question is, whether since the Union a judgment given in Ireland is a record of this country? The only instance where assumpsit appears to have been brought on a judgment given in Ireland is *Vaughan v. Plunkett*,‡ and it does not appear what ultimately became of the case. There may, perhaps, have been instances where assumpsit has been brought on decrees of the Courts in Scotland, but no objection to the form of action having been taken, they do not decide what the law is. In *Collins v. Lord Mathew*,† this Court intimated a clear opinion, that since the Union the judgments of the Irish Courts were properly pleadable as records. The Act of Union makes Great Britain and Ireland one country, and a record of one part

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† 5 East, 473.

‡ 3 Taunt. 85.

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of the country is a record of the whole. *Walker v. Witter*[†] is an authority to shew that *nul tiel record* cannot be pleaded to a foreign judgment; and *Collins v. Lord Mathew* shews that it is a proper plea to an action brought on an Irish judgment.

(ABBOTT, Ch. J.: Have you considered whether in the distribution of assets a judgment given by one of the superior Courts in Ireland is considered entitled to priority in England as a specialty debt, or a mere simple contract debt?)

In *Otway v. Ramsay*,[‡] the question was mooted, whether an English judgment was to be considered as a simple contract debt in Ireland, but it does not appear to have been decided.

[414] ABBOTT, Ch. J.:

There is another difficulty in this case. If this is to be considered a judgment in this country, it will bind the land. These points were not considered in *Collins v. Lord Mathew*. The Act of Union says, "that all laws in force at the time of the Union shall remain." Now, before the Union, a judgment given in Ireland would not bind lands in this country. To hold that it would since the Union, would have the effect of altering the law. Adverting to those consequences as at present advised, we think that *assumpsit* will lie, but as these points may have come upon the defendant by surprise, we will discharge the rule *nisi*, giving the defendant's counsel a few days to consider these points.

The case stood over to this day, when the LORD CHIEF JUSTICE said, that since the argument, *Selwyn* had furnished the Court with a note of the case of *Otway v. Ramsay*,[‡] by which it

[†] 1 Doug. 1.

[‡] *Otway v. Ramsay*, S. C., shortly reported in 2 Strange, 1090; Vin. Abr. 569, tit. Ireland (E.) pl. 5; B. R. Hil. 7, 10 Geo. II.

Error from the Court of King's Bench, in Ireland, on a judgment given in the Court of Common Pleas

there, in an action of debt brought against the defendant (who was made executrix to her husband) upon a judgment here, to which action defendant pleaded that her husband upon their intermarriage entered into articles with trustees to leave her the sum of 3,000*l.* by his will,

appeared to have been *solemnly decided, after two arguments, that before the Union, a judgment given in England had not the force and effect in Ireland, of a judgment of record in *that country. The effect of the decision was, that a judgment in one

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and gave a bond for the performance of it, and that in fact he did not leave her 3,000*l.* by his will; and that the husband in his lifetime confessed a judgment upon this bond, by which she became entitled to this 3,000*l.*, and that she had not assets ultra. To this plea there was a demurrer and joinder, and judgment in both Courts there given for the defendant.

Taylor argued for the defendant in error, and *Chapple*, Serjt., *contra*.

Lord HARDWICKE, Ch. J. said, he did not intend to give any opinion in this case, but as it was to be argued again, he would break the case a little for the better information of those who were to speak to it again. In this case there were two principal questions:—

*1st. Whether an action of debt will lie in Ireland upon a judgment given in a superior Court in England?

2nd. If such action will lie, if any priority or preference is to be given in Ireland to a judgment obtained in England, before a judgment obtained in Ireland, or *vice versa*?

The cases cited as to the jurisdiction of counties palatine are not to the present purpose, because those counties are, and ever were, part of the kingdom of England, whereas Ireland is only part of the Crown of England. Nor can any argument be drawn in this case from our superintending the laws of Ireland, because they are only considered there as coming by way of appeal. For as Ireland is a province to England, and consequently is sub-

ject to be bound by our laws, and is so bound by our statutes where named in them, it is necessary that Ireland should submit to the final interpretation and judgment of this kingdom. And the reason is because that the power of giving a final exposition and construction of a law is equal to a power of making it; for in such a case Ireland might expound the law as they pleased, and so defeat the very intention of the law-makers; wherefore it is absolutely necessary that the kingdom of England, which gives laws to Ireland, should have the final determination of those laws. But this is an action of debt brought in Ireland upon a judgment given in England, which judgment given in England cannot be executed in Ireland, because we cannot send our writ to the sheriff in Ireland. And the reason of a judgment given here upon a writ of error on a judgment in Ireland, being executed in Ireland, is, because we can from this Court certify to the Court in Ireland our proceedings here. And a judgment in England cannot bind lands in Ireland because we cannot send a writ to the sheriff to extend lands there.

The principal doubt in this case is, that the Courts in England and Ireland proceed in this case by the same rules of law; and therefore it seems hard if a judgment given here should not be *res judicata* in Ireland. For in proceedings by the civil law where all nations proceed by the same rules a sentence given in one nation is held valid by another; wherefore a sentence given in France by the Court of Admiralty there for

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country was not to be considered as a matter of record in the other ; so as to bind land, or to *have priority as a specialty debt. He then asked the counsel for the defendant if he had any further argument to urge to the Court.

the condemnation of a ship, is, by a proper certificate of the Court, held valid here. So I shall be glad to have it insisted on the next time it is argued, what credit is to be given by one Court to the acts of a Court of another nation, proceeding both by the same rules of law. It is very *desirable in such case that the judgment given in one kingdom should be considered as *res judicata* in another.

[*416, n.]

Then, as to the preference of those judgments, it is a question which much concerns both England and Ireland. As a judgment in England is no lien on lands in Ireland, so neither can it bind the goods and chattels there; for no writ can be sent hence to the sheriff there to levy them. Wherefore it seems as if a judgment given in England should not have the same power and equality in Ireland with a judgment given there. And suppose an action of debt brought against an executor upon a judgment given there, is that executor to send over to England to search all the Courts in Westminster to see whether any judgment is given against his testator there? And will it be a devastavit in him if he does not do it? A debt due to the King is prior to any debt due to any subject in England, but in case the King's debt is not upon record, the executor may prefer the subject's debts without incurring a devastavit: so the reason seems to hold in this case, for a judgment given in England is not a matter of record in Ireland.

[*417, n.]

The other Judges said nothing to it, and it was ordered to be argued again.

MICH. TERM, 11 Geo. II.

This case coming on again, Serjt. Parker argued at great length for the plaintiff, and Denison for the defendant.

LORD HARDWICKE, Ch. J.:

I think Ireland must be considered as a provincial kingdom, part of the dominions of the Crown of England, but no part of the realm. It is a question of very great consequence whether an action of debt will lie in Ireland upon a judgment given in England. The case of *Musgrave v. Wharton*, Yel. 218, seems to prove that actions of debt upon judgments must be considered as a local matter. So does the case of *Hall v. Winckfield*, Hob. 195. Nor has any good authority been cited in opposition to these cases, only the anonymous case in Salkeld, 209, and Comb. 220, and Salk. 439, contradict that case: so I think that case can have no great weight. I do not apprehend that the want of jurisdiction in the Courts of Ireland need have been pleaded, for in England these Courts have a general jurisdiction over the whole kingdom, so that if they are to be deprived of it, the defendant must shew, by pleading, that he has a right to be sued in the counties palatine or elsewhere, which clearly differs from the case in the Courts of Ireland. Executors and administrators must at their peril take notice of debts that are upon record, or they will be liable *to a devastavit, and there is an express case to that purpose in Cro. Eliz. 793, *Littleton v. Hibbins*, where upon a *scire facias* against executors, it was held immaterial to plead that they had no

Evans :

It must be admitted, that before the Union a judgment obtained in one kingdom would not have been considered a judgment of record in the other. But the question is, whether,

notice of the judgment. It is certain that Acts of Parliament made in England do not affect Ireland, unless it be particularly expressed. And since that is so, it would be very strange that the judgment of the Courts here should affect that kingdom. If they were to do so, executors and administrators could never safely act. The case in the Register 43 is very extraordinary. The distinction taken is very proper, between mandatory writs which issue to all inferior Courts and jurisdictions whatsoever, and ordinary or remedial writs which are only for the benefit of the subject; and this is taken notice of in Vaughan, 290. And there the writs of error are held to be an argument of superiority, for if there were not writs of error from an inferior or provincial kingdom, as Ireland is to England, they might, by expounding and interpreting the laws after their own manner, render them quite ineffectual. These mandatory writs are in the nature of prerogative writs.

PROBYN, J. :

I am of the same opinion in regard to the locality of actions upon judgments; the Courts of Ireland have records of their own, to which any of the subjects of that kingdom may at any time resort; and therefore they must take notice of them: but they cannot have such access to the judgments of these Courts which are recorded here, and, therefore, I think they cannot be obliged to take notice of our judgments; when their judgments are affirmed here by writ of error, they are put in execution there by writs mandatory to their

Judges, and are executed as judgments of Ireland affirmed, and not as judgments of this Court. Supposing the record has been transmitted, I do not see how it would be a record of that kingdom; and if it be not, it cannot take the place of what is already a judgment there.

PAGE, J. :

I think the actions brought upon judgments must be local; and as this has been determined in regard to the different counties of England, sure it ought to hold between the kingdoms of England and Ireland.

CHAPPLE, J. :

If the plaintiff cannot recover his loss, it is very hard; for the defendant does not plead that she has administered all the effects in her hands, but confesses she has assets, and submits it to the Court how she shall dispose of them. This debt seems to be of such a nature as can hardly be sued for in Ireland. If he were to bring an original action there, it would be pleaded in bar that he had already recovered in England, for this is now become a debt upon judgment here, which before was only a debt upon a simple contract; so that the plaintiff is really in a worse condition by reason of the diligence he has used to obtain judgment for his debt; for this judgment prevents his bringing an action in Ireland, where possibly he might recover his debt.

Per CUR. : To stand over.

The judgment was afterwards affirmed in Easter Term, 11 Geo. II., without any argument.

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[*418, n.]

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the two countries having by the Act of Union become one kingdom, a record of one part of the kingdom is not a record of the whole? It is true that an article of the Union declares, that all laws then in force are to remain the same; but, before the Union, assumpsit would not lie on a record, nor will it now. It certainly has been the practice since the Union to declare in debt on an Irish judgment; and to plead *nul tiel record*.

ABBOTT, Ch. J. :

We do not say that the action of debt may not be maintained on an Irish judgment; but if it be a record in this country, it must have all the consequences of a record; it must bind lands, and rank as a specialty debt in the distribution of personal assets. I have enquired of a very learned person, whether in marshalling assets it is considered to be entitled to priority as an English judgment; and the result of that enquiry is, that it is not. Upon the whole, we are of opinion that the rule for arresting the judgment must be discharged.

Rule discharged.

FAULKNER, CLERK, *v.* ELGER & NEWBY.

(4 Barn. & Cress. 449—458; S. C. 6 Dowl. & Ry. 517.)

1825.

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In an action for a false return to a writ of mandamus it was alleged to be a custom in a parish that whenever a certain perpetual curacy should be vacant by reason of the death of the curate or otherwise, the parishioners should elect a fit person to succeed him; and that a vacancy having occurred, plaintiff was duly elected by the parishioners according to the custom. At the trial it appeared that at a meeting of the parishioners duly convened for the purpose of such an election, it was decided before the election began that parishioners who had not paid church-rates should not be allowed to vote. In consequence of this resolution, several persons who had the legal right of voting did not tender their votes, and the votes of others who did tender their votes were rejected, on the ground that they had not paid the church-rate: Held, that a party elected by the majority of the persons whose votes were received at this meeting was not duly elected by the parishioners according to the custom.

At the election every parishioner tendering a vote gave a card containing only the name of the candidate for whom he voted; semble, that this mode of election was illegal.†

THIS was an action for a false return to a writ of mandamus. Declaration stated, that the defendants were the churchwardens of the parish of St. Sepulchre, in the town of Cambridge; and that the curacy of the parish church of the said parish was a perpetual curacy, within the diocese of, &c., endowed, &c., and that, from the time of such endowment of the said curacy, there had been, and still was, within the said parish a custom, that when, and so often as it had happened, that the said perpetual curacy had been or should be vacant, by reason of the death of the perpetual curate thereof, or otherwise, the parishioners of the parish had been used and accustomed to elect, and ought to elect a fit and proper person, in holy orders, according to the rites, &c., to be the perpetual curate thereof for the time being; which said person so elected as aforesaid, the churchwardens and parishioners of the said parish, during all that time, had been used and accustomed to nominate; and, of right, ought to nominate to the Bishop, in order that he might

† According to the decision of BACON, V.-C., in *Shaw v. Thompson* (1876) 3 Ch. D. 233; 45 L. J. Ch. 827; this ground of objection

would not be good, since Parliament has sanctioned voting by ballot in Municipal as well as Parliamentary elections.—R. C.

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be duly licensed to the curacy. The declaration then stated, that, on the 24th day of November, 1823, at, &c., a vacancy having occurred in the said perpetual *curacy, by the resignation of the perpetual curate thereof, an election was had and made by the said parishioners of the said parish, pursuant to the said custom; and, thereupon, plaintiff being a person having taken holy orders, according, &c., was to wit, on, &c., at, &c., duly, and according to the custom of the said parish, elected by the parishioners of the said parish, to be the perpetual curate; and, thereupon, it became the duty of the defendants, so being such churchwardens as aforesaid, to summon a meeting of the parishioners of the parish, in order that the plaintiff might, by the defendants, and the parishioners, be nominated to the Bishop, for licence to the perpetual curacy; that, after the plaintiff had been so elected, he applied to the defendants, as churchwardens, and requested them to summon a meeting of the parishioners of the parish, for the purpose of nominating the plaintiff as aforesaid, yet, that defendants refused to summon such meeting for that purpose; and, thereupon, the plaintiff, on the 31st May, 1824, obtained from the Court of K. B. a writ of mandamus (which was set out in the declaration) commanding them to do so without delay; and that the defendants being churchwardens, falsely and maliciously returned, that the plaintiff was not duly, and according to the custom of the said parish, elected to the said perpetual curacy, in manner and form, &c.; by reason whereof, the plaintiff had been deprived of the said curacy, and of the profits and advantages thereof, &c. At the trial before Gaselee, J., at the last Spring Assizes for the county of Cambridge, it appeared, by an entry in the church and poor-rate

[*451] *book, dated November 24th, 1823, that, at a meeting of the parishioners for the election of a minister, according to notice given in the church for that purpose, the major part of the parishioners present had elected the Rev. H. Robinson; the number being for Robinson 86, for the plaintiff 34. It was proved, that C. Nainby, a householder, who paid poor-rates, had actually voted for the plaintiff; but being afterwards desired by the chairman to withdraw his vote, on the ground that he had no right to vote, not having paid church-rates, he withdrew one

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of the cards on which the plaintiff's name was written. Duckins, Harbone, Robert Everett, and Wells, four other householders, who paid poor-rates, did not actually tender their votes, but went to the church for that purpose; and were deterred from tendering them, because they were informed that they were not entitled to vote, on the ground that they had not paid church-rates. It was admitted, on the other hand, that a person of the name of Herring, who voted for the plaintiff, had no right to vote. It appeared, further, that the mode of election was by the party intending to vote giving in a card, containing the name of one of the candidates, but not the name of the voter. On the part of the defendants, it was proved, by a Mr. Abbott who presided at the meeting, that, before the election began, it was decided, that the votes of persons who had not paid church-rates should not be received. It was also proved, that one James Everett, a householder, who had intended to vote for Robinson, was refused, on the ground that he had not paid church-rates; and that Flack, the parish clerk, went to the church to offer his vote, but did not, in fact, tender it, in consequence *of being told that he had no vote, because he did not pay church-rates. The learned Judge expressed some doubt whether the voters, whose names were then proposed to be added to the poll, could, in point of law, be considered as having tendered their votes, inasmuch as they acquiesced in the objection, by not insisting that they had a right to vote; but he left it to the jury to find, whether the right of election was in the parishioners, as alleged in the declaration; and for whom the voters, whose votes had been inquired into at the trial, intended to vote. The jury found the custom to elect for the plaintiff, as alleged in the declaration; and they found for the plaintiff as to the votes of Nainby, Duckins, Wells, Harbone, and Robert Everett, for the defendant, as to the vote of James Everett; consequently, the plaintiff having 38 votes, after deducting that of Herring, and Robinson only 37, the verdict was entered generally for the plaintiff. A rule *nisi* for a new trial was obtained in Easter Term last, upon two grounds, first, that the mode of election by ballot was illegal; and, secondly, that the votes added at the trial had not been duly tendered.

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Storks and Dover now shewed cause :

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Election by ballot is a legal mode of election. The custom alleged in the declaration is general ; and the jury have found that by the custom, no particular mode of election is specified. The Court will therefore put such a construction on the act of the parishioners, *ut res magis valeat quam pereat*. The custom being for the parishioners to elect, it was competent to them to adopt any reasonable mode of election. Now election by ballot is *a reasonable, and, therefore, a legal regulation. The clergyman not knowing who votes for or against him, will come into the parish with equal goodwill to all. It does not contravene the general law. It is quite clear that a majority of the parishioners are competent to make regulations to bind the whole. In *Stoughton v. Reynolds*,† the right of adjourning a vestry was held to be in a parish at large, and in 16 Viner's Abr. tit. Parishioners (A), pl. 5, there is the following passage : " Parishioners are a body politic to many purposes ; as to vote at vestry if they pay scot and lot ; they have a sole right to raise taxes for their own relief, without the interposition of any superior Court ; may make bye-laws to mend the highways, and to make banks to keep out the sea, and for repairing the church, and making a bridge, &c., or any such thing for the public good ; and by 3 & 4 Will. III., and 7 Anne, to tax and levy poor-rates, and to make and maintain fire engines ; and by 9 Geo. I. c. 7, s. 4 for purchasing workhouses for the poor." Then the exclusion of persons from voting who had not paid the church-rate was illegal. It is true that there is a power incident to every body to make regulations binding on themselves, if they be not contrary to law. But by the 58 Geo. III., c. 69, s. 4, all persons are entitled to vote at vestries who pay poor-rates. The restriction in this case was therefore contrary to law, and there is no pretence for saying that it formed part of the custom. Then as to the mode of voting where the election is by polling ; there it is the duty of the voter to tender his vote for a particular person, and to see that his tender is recorded in the poll-book. Here there is no book, the object being that the voter should not be known ; therefore, no such tender could be made.

† 2 Str. 1045.

Robinson, contra :

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The mode of election pursued in this case was illegal. It is the duty of the returning officer to return as duly elected that person who is elected by the majority of those who have the legal right of voting. Now if the voter is permitted to give a paper containing the name of the candidate for whom he votes, without the addition of his own name, it becomes impossible, in the event of a scrutiny, for the returning officer to strike off the votes of those who had not the right of voting. He, therefore, puts it out of his power by this mode of election, to return with certainty the person who was duly elected. Besides, if such a mode of election by ballot, or by presenting a card, were legal ; in this case, some of the persons who intended to vote did not go into the room, and *Rex v. Ellis*† is an authority to shew, that without personal presence, such intention, however frustrated, will not constitute a vote. This is always necessary. But assuming that the mode of election was legal, the plaintiff has not made out that he was duly elected according to the custom. The custom as alleged is, that the parishioners in general are to elect. Now the plaintiff has not made out that he was elected by a majority of the parishioners, but only by a majority of those parishioners who had paid the church-rates. He was then stopped by the Court.

BAYLEY, J. :

The right of election is thus stated in the declaration, that there was a custom within the parish, that when the perpetual curacy was vacant by reason of the death of the curate, or otherwise, the parishioners should elect a fit person. The present action *is brought for a false return to a mandamus, by which the defendants have certified that the plaintiff was not duly and according to the custom of the parish elected. Now if the votes were equal there was no election. It appears that before the election began, it was decided that the votes of persons who had not paid the church-rates should not be received. That appears to me not to have been a legal resolution. If, however, it was a good and legal rule, then Mr. Robinson had the

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† 17 St. Trials, 822.

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majority of the votes. If it was an illegal resolution, as it is impossible to say how many persons may have kept away on the supposition that it was to be a settled rule, I think the election is void. I am disposed to think that an election under such a rule could not be good without the consent of all the electors. But taking the right of election to be in the parishioners at large, to whom no such disqualification applied, the question is whether the mode of election pursued in this case was legal. It is not necessary to give a decided opinion upon that point, but I incline to think that it was not legal. I do not mean to apply my observation to a case where each person inserts his name in a book, but to that species of election where the voter gives his vote in such a manner that no person but himself can know for whom he voted. The common law mode of election is by shew of hands, or by poll, and the party electing is then said to have a voice in the election. The objection to the mode of voting by ballot is, that it presents an insurmountable difficulty to a scrutiny, because no person can tell for whom a particular individual voted. Another objection to election by ballot is, that the taking of votes in this secret and private manner has a tendency *to encourage perjury. Suppose the numbers equal, and one man has tendered his vote, which has been refused, he will carry the election, according as he says he would have voted, one way or the other. I do not mean to express a decided opinion upon this point, but I incline to think, for these reasons, that this is not a legal mode of election. Independently of this, the plaintiff has not made out that he had the majority of legal votes. It appears by the learned Judge's report, that upon the finding of the jury, the plaintiff must be taken to have had thirty-eight votes, including that of Robert Everitt, and Mr. Robinson thirty-seven; but it further appeared that Flack, the parish-clerk, went up to offer his vote, and was told that he had no vote, because he paid no church-rates; but it is left in dubio for whom he intended to vote. Suppose, therefore, that before Flack came to vote the plaintiff had a majority of votes, who can say that the numbers are not equal now, it being left in doubt whether Flack meant to vote for the plaintiff or for Robinson? If he intended to vote for Robinson, then the

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numbers would be equal. It lay upon the plaintiff to shew that he had the majority of votes. Now as Flack had a right to vote, and perhaps intended to vote for Robinson, the plaintiff has failed in making out that he had the majority of votes.

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HOLROYD, J. :

The question upon this record must be taken to be, whether the plaintiff was duly elected, according to the custom in the parish, as stated on the record. The custom is, that the parishioners are to elect a fit and proper person to be the perpetual curate thereof for the time being; and it is alleged in the declaration that the plaintiff was elected according to *that custom. I am of opinion that he was not elected according to that custom, because upon the evidence it appears that he was elected by those parishioners only who paid the church-rates. He has not, therefore, made out in proof the allegation in the declaration, that he was duly elected according to the custom, because he has not shewn that he was elected by the parishioners in general. I think it was not competent to the parishioners to narrow the custom by passing a bye-law which would have the effect of making it depend on the will of particular persons whether a person had a right to vote or not. I have great doubt, also, whether election by ballot be a legal mode of election or not. Some advantage may accrue from it, such as avoiding ill will amongst the parishioners, and leaving the voters uninfluenced; but I think that it is the duty of the returning officer to see that the person returned is duly elected, and that he is bound to use reasonable means to attain that end. Now if he takes down the names of the voters, and the persons for whom they vote, and it afterwards appears that any person has been admitted to vote who has no right to vote, his name may, on a scrutiny, be struck off. In the case of an election by ballot, the returning officer puts it out of his power to ascertain whether the party who voted had a right to vote or not. But it is not necessary to decide that point; it is sufficient to say, that the plaintiff was not elected by the parishioners in general, but only by those paying the church-rate. I think, also, for the reasons

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ELGER. stated by my brother BAYLEY, that the plaintiff did not make out that he had the majority of votes.

LITLEDALE, J.:

[*458] The custom as alleged in the declaration *is, that the parishioners should elect; all parishioners, therefore, had a right to elect; but it was decided at the meeting that no persons who had not paid the church-rate should vote. Now, it is possible that no church-rate may have been made for many years before, and, therefore, that a party may not have paid the rate, because there was none to be paid; but I think that the parishioners, at the time of meeting for the purpose of electing, had no right to restrict the number of electors. Corporators have the right to make reasonable bye-laws, even to restrict the number of electors; but that must be done at a corporate meeting, convened for the purpose, and of which reasonable notice must be given. I will not say whether the parishioners had a right in this case, if they had given due notice of their intention, to make it a rule that no person who had not paid the church-rate should have a right to vote. I am clearly of opinion that they had no right to do it on the spur of the occasion. As to the other question, it is clear that at common law, where parties have the right of voting, the restriction of voting by ballot cannot be imposed. The writing of the name of the candidate on a card is not strictly an election by ballot. The great objection to such a mode of election is, that there can be no effectual scrutiny, because if it be afterwards discovered that a given individual has voted who had no right to vote, it is impossible to say on which side he voted. I think that the mode of election adopted in this case was illegal. But it is unnecessary to decide that point. It is sufficient to say, that the plaintiff has not made out that he was elected by the parishioners. That being so, I think the rule for a new trial must be made absolute.

Rule absolute.

WOODCOCK v. GIBSON AND OTHERS.

1825.

(4 Barn. & Cress. 462—465; S. C. 6 Dowl. & Ry. 524.)

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The 59 Geo. III. c. 12, s. 17,† vests in the churchwardens and overseers of the poor, in the nature of a body corporate all buildings, lands, and hereditaments belonging to the parish: Held, that in order to constitute the body corporate intended by the Act, there must be two overseers, and a churchwarden or churchwardens, and that where there were two overseers appointed, one of whom was afterwards appointed (by custom) sole churchwarden, the Act did not vest parish property in them.

TRESPASS for breaking and entering a close, called the garden, in the parish of Thorp, and destroying vegetables, &c. Plea, 1st, not guilty; 2nd, that the close was the soil and freehold of Gibson and one Joseph Taylor, then being the sole churchwarden of the parish of Thorp; 3rd, that it was the soil and freehold of Gibson and the said Joseph Taylor, as and then being the overseers of the poor, and the said J. Taylor then being the sole churchwarden of the said parish. Replication to each that it was the close of plaintiff, and not of Gibson and Taylor in manner alleged. At the trial before Best, Ch. J., at the Lincoln Summer Assizes, 1824, the *trespass was proved, and for the defendants it was shewn, that the *locus in quo* was parish property, and that Gibson and Taylor were appointed overseers of the poor, on the 5th of April, 1823, and on the 22nd of the same month, Taylor was appointed sole churchwarden, it being the custom of the parish to have one only; and it was then contended that the *locus in quo* vested in them by the operation of the 59 Geo. III. c. 12, s. 17.† The CHIEF JUSTICE was of that opinion, but directed

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† By which it is enacted, “that all buildings, lands, and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this Act, shall be conveyed, &c. to the churchwardens and overseers of the poor of every such parish respectively, and their successors in trust for the parish; and such church-

wardens and overseers of the poor and their successors, shall and may, and they are hereby empowered to accept, take, and hold in the nature of a body corporate for and on behalf of the parish, all such buildings, lands, and hereditaments, and all other buildings, lands, and hereditaments belonging to such parish.”

See now also s. 14 of the Local Government Act, 1894 (56 & 57 Vict. c. 73).—R. C.

WOODCOCK
v.
GIBSON. the jury to assess the damages on the 2nd and 3rd issues to save
expence, if this Court should be of opinion that the close was
not the soil and freehold of Gibson and Taylor, and the jury
assessed the damages at one penny. A rule *nisi* for entering a
verdict for the plaintiff on those issues having been obtained in
Michaelmas Term,

Phillipps now shewed cause :

The only question to be considered is, whether the evidence
given at the trial supported the second or third plea. Now it
appeared that the appointment of Gibson and Taylor, as over-
seers, preceded the appointment of Taylor as churchwarden.
The property would by the 59 Geo. III. c. 12, s. 17, immediately
vest in them as overseers, and it is immaterial to consider whether
[*464] Taylor was afterwards legally *appointed churchwarden.

(BAYLEY, J. : Would it not vest in them and the then church-
wardens ?)

The evidence did not shew that there was at that time a church-
warden. Now if the property vested in Gibson and Taylor, as
overseers, the 2nd plea was proved, and that is an answer to the
action. It was objected at the trial, that these persons were not
overseers within the meaning of the statute, because one of them
was also appointed churchwarden, and *The King v. All Saints,
Derby*,† was cited. But that only decided that as the statute
48 Eliz. c. 2 requires apprentices to be bound, “by the church-
wardens and overseers, or the major part of them,” there must
be two overseers besides the churchwardens, in order to execute
the powers given by the Act. Those are mere naked powers, and
to be strictly pursued. The question here is quite different, and
is simply, whether the property did not vest in Gibson and Taylor
immediately on their appointment as overseers ; and if so, there
was nothing to divest it afterwards.

Clarke and *N. R. Clarke*, *contra* :

The 59 Geo. III. c. 12, s. 17, gives the property to the church-

† 13 East, 143.

wardens and overseers as a corporation. Gibson and Taylor were not at the time of the trespass, nor had they ever constituted a corporation of churchwardens and overseers, the property, therefore, never vested in them. *The King v. All Saints, Derby*, expressly decided that there must be two overseers, distinct from the churchwardens, in order to comply with the requisites of the 43 Eliz. c. 2.

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GIBSON.

BAYLEY, J. :

The 17th section of the 59 Geo. III. c. 12, certainly vests the property in the churchwardens and *overseers as a body politic ; and, therefore, until officers of both descriptions are appointed, nothing vests in either of them. Now Gibson and Taylor were appointed overseers on the 5th of April ; if there were at that time a churchwarden, the property might vest in him and the overseers ; but that does not appear, nor is there a plea to that effect. Taylor was afterwards appointed churchwarden, but neither before that appointment nor afterwards, could he and Gibson, by themselves, constitute a corporation of churchwardens and overseers. The property, therefore, would not vest in them, so as to support the pleas of soil and freehold, and the rule for entering a verdict for the plaintiff must be made absolute.

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Rule absolute.

1825.

COTTERILL v. HOBBY.

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(4 Barn. & Cress. 465—467; S. C. 6 Dowl. & Ry. 551; 3 L. J. K. B. 276.)

Case for an injury done to plaintiff's reversionary interest in land, by cutting and carrying away branches of trees growing there. 2nd count in trover for the wood carried away. It appeared in evidence that the land was let by the plaintiff to the occupier under a written agreement: Held, that in order to support the 1st count the plaintiff was bound to produce it.†

The plaintiff proved that the defendant carried away some branches of the trees, but gave no evidence of the value: Held, that he was entitled to nominal damages on the count in trover.

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THE declaration stated, that at the time of the grievances complained of, a certain close, situate, &c., was in the possession and occupation of one H. C. Morgan, as tenant thereof to the plaintiff, the reversion then and still belonging to the plaintiff, and that the defendant cut down a quantity of branches off and from certain trees then standing and growing in and upon the said close; second count trover for timber. Plea, the general issue. At the trial before Garrow, B. at the last Lent Assises for Hereford, Morgan was called as a witness for the plaintiff, and proved that he was tenant to the plaintiff *of the close in question, under a written agreement, that defendant lopped some branches off the trees growing there, and carried them away. No evidence of the value was given. For the defendant, it was objected that the agreement under which Morgan held should have been produced, for that it could not otherwise appear that the plaintiff was reversioner of the trees. The learned Judge refused to nonsuit the plaintiff, and the jury returned a general verdict with 5*l.* damages. In Easter Term Campbell obtained a rule *nisi* for entering a nonsuit against which

Taunton and Oldnall Russell now shewed cause:

Morgan proved the fact of his being tenant of the close in question, under the plaintiff. In the absence of any proof to the contrary, it must be presumed that the trees were demised

† Some doubt is thrown upon the correctness of the decision on this point by *Strother v. Barr* (1828) 5

Bing. 136, where the Judges of the Common Pleas were equally divided. —R. C.

together with the close. If they were excepted, it was for the defendant to prove it: *Doe v. Morris*.† At all events the objection does not apply to the count in trover; that, therefore, is sufficient to sustain the verdict.

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v.
HOBBY.

Campbell and Maule, contra :

No reliance was placed upon that count at the trial, nor was any evidence given to guide the jury in giving damages. The verdict cannot, therefore, be applied to that count. With respect to the other, it was proved that Morgan held the close under a written agreement, and unless that was produced there could be no legal evidence that the plaintiff was reversioner. If the trees were excepted out of the demise, the action should have been trespass and not case.

BAYLEY, J. :

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It having been shewn that Morgan held under a written agreement, I am of opinion that the terms of the holding could only be proved by that instrument, and, consequently, that the verdict on the first count cannot be sustained. But the objection does not apply to the count in trover. The trees were equally the property of the plaintiff, whether they were or were not excepted out of the demise; and it having been proved that the defendant carried away some of the branches, I think that the plaintiff is entitled to nominal damages, although no proof of the value was given.

HOLROYD and LITLEDALE, JJ. concurred.

Rule discharged, the verdict being reduced to 1s.

† 12 East, 237.

1825.

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THE KING *v.* BOLDERO, CLERK.

(4 Barn. & Cress. 467—473; S. C. 6 Dowl. & Ry. 557.)

Where an Inclosure Act enacted that the tithes of a certain parish should be extinguished, and that in lieu of them the commissioners should award to the rector a certain annual rent, equal in value to a certain portion of the lands in the parish, to be paid by the owners of those lands in such proportions as the commissioners should award: Held, that the rector was liable to be rated to the poor in respect of this rent or annual payment, the Act not having expressly exempted it from that burthen.

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UPON an appeal against a poor rate for the parish of Calton cum Willingham, in the county of Cambridge, the Sessions confirmed the rate, subject to the opinion of this Court, upon the following case: Previous to the year 1799, the rector of the parish of Calton cum Willingham was, in right of his said rectory, entitled to the tithes of corn, grain, hay, and all other great and small tithes arising within that parish; but in that year an Act of Parliament was passed for “dividing, allotting, and enclosing the open and common fields, *commons, waste, and other commonable lands and grounds in the parish of Calton cum Willingham, in the county of Cambridge, and for extinguishing the tithes in the said parish;” and in the Act was the following clause: “And whereas it is proposed and agreed that all tithes whatsoever arising within the parish of Calton cum Willingham aforesaid, and payable to the rector of the said parish, shall cease and be for ever extinguished, and that, in lieu thereof, certain yearly rents or sums of money shall be ascertained and paid to the rector of the said parish for the time being, in manner hereinafter mentioned; be it therefore further enacted, that the said commissioners shall ascertain and determine the annual value of all the lands and grounds within the said parish of Calton cum Willingham, subject or liable to the payment of tithes in kind to the said rector, and also what yearly sum of lawful money of Great Britain will, according to the valuation aforesaid, be equivalent to one fifth part of all the arable lands, one twelfth part of all the wood lands, and one ninth part of all the other lands and grounds in the said parish which are severally subject and liable to the payment of tithes

in kind to the said rector; and the said commissioners shall also ascertain and determine, according to the proportions aforesaid, the several parts or proportions of the said yearly sum to be charged upon each of the several estates of the respective proprietors, as a yearly rent, payable thereout respectively to the said rector and his successors, in lieu of the tithes thereof; and the same shall be and are hereby charged thereon accordingly."

The Act then provided, that in case the said yearly rents or sums should be in arrear, it should be lawful for the rector and his successors to have and *exercise such or the like powers and remedies for recovering the same, and the costs and charges incurred by the non-payment thereof, as by the laws and statutes of this realm are provided and given for the recovery of rent reserved on any lease or demise, or other rents in arrear. It was also enacted, that from and after the commencement of the several yearly rents therein before directed to be ascertained and paid to the rector and his successors in lieu of tithes as aforesaid, all tithes, both great and small, and all payments in lieu of tithes appertaining to the said rectory, and arising and payable upon, out of, or for all and every or any of the lands and tenements within the parish of Calton cum Willingham, should cease, determine, and be for ever extinguished (Easter offerings, mortuaries, and surplice fees only excepted). The commissioners were also to ascertain the average price of a bushel of wheat for twenty-one years then last past; and at the expiration of fourteen years from the making of the award, either the parishioners or the rector might insist upon having a new average taken; and the yearly rents or payments to him in lieu of tithes were to be increased or diminished, in proportion to the difference between the price of wheat upon the average so taken and that originally taken by the commissioners. The commissioners having ascertained the several matters required by the Act, awarded a certain annual payment to the rector, in pursuance of the Act, and then awarded, that from a day preceding the date of the award, "all and all manner of tithes, both great and small, arising, growing, and renewing, as well out of or from all the lands or grounds by the said Act intended to be divided, allotted, and inclosed, and exonerated from tithes, as out of all the homesteads, homecloses

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*and all other lands and grounds within the said parish, should cease and determine, and be for ever extinguished." In April, 1824, the rector, W. Boldero, was rated to the poor in respect of the annual payment to him by virtue of the award, which in the rate was described as "corn-rent as composition for tithes." The question for the opinion of this Court was, whether the rector was liable to be rated in respect of that composition?

Nolan, in support of the order of the Sessions, was stopped by the COURT.

Marryat, contrà :

If tithes are let for a term of years, the rector or vicar is not rateable in respect of them; and here it may be said, that as no variation in the settlement can be made until the expiration of fourteen years from the date of the award, the tithes have, at all events, been let for that period. The rector in this case has not received tithes, but rents issuing out of the lands in lieu of tithes. It has been held that the clerk is rateable where the tenant is allowed to retain his tithes; but when they are let, the owner can no more be rated for them than a landlord in respect of the rent of a farm. Under this Act the money received by the rector is not for tithes, but is a rent, and is so called in the Act, and the rector has not the choice of receiving the tithes if he pleases; they are necessarily retained by the occupier of the land. The case is very similar to *Chatfield v. Rushton*,† where the parson was held not to be rateable. *Loundes v. Horne*‡ proceeded on the *ground that the payment to the parson was not a rent.

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(LITTLEDALE, J. : It does not follow, because it is called a rent, that all the legal attributes of rents attach. You must look to the substance of the thing.)

The mode in which the amount of payment is to be ascertained shews that it ought to be exempt from the burthen sought to be imposed. The commissioners are to ascertain what yearly sum will be equivalent to a certain portion of the lands in the parish,

† 3 B. & C. 863.

‡ 2 W. Bl. 1252.

and to award that to the rector. Now, according to *Rex v. Hull Dock Company*,† the value of the land is the rent it will bring, after paying the poor-rate, so that the amount of the poor-rate would be deducted from the value of the part awarded to the rector. To hold that he is rateable, would, therefore, be to make him, in effect, pay the rate twice over

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BAYLEY, J. :

It is perfectly clear that tithes are rateable to the poor; but this question arises upon an Act passed in the 39 Geo. III., extinguishing tithes in the parish of Calton, and securing to the rector a certain annual payment in lieu of them. Before that time, *Lowndes v. Horne*, *Rex v. Toms*,‡ and *Rann v. Picking*§ had been determined, from which cases this principle may be collected; that if, under an Inclosure Act, a sum of money is given to the rector or vicar, in lieu of tithes which were rateable, that money will also be rateable, unless the liability is taken away by express words in the statute. It appears to me that, in the present case, the money payment is liable to the same burthens as the tithes for which it was substituted. It is indeed called a rent, but in fact is nothing more than a sum of money *paid annually in lieu of tithes, and is not to have all the attributes of a rent, although the Act gives the same mode of recovering it. Then it has been urged, that in valuing the land the poor-rate would be deducted, and therefore the rector would, on that account, get a smaller sum, and ought not to be rated in respect of it. But there is a fallacy in that: for, before the statute, the land was charged with a poor-rate, payable both by the occupier and the tithe owner; and in the calculation by the commissioners, that part only which was payable by the occupier would be deducted; and unless the money in the hands of the rector were liable in the same manner as the tithes, a loss would be sustained by the parish. For these reasons, I think that the rate was a good one, and was properly confirmed.

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HOLROYD, J. :

I think that the Sessions were right in confirming this rate.

† 3 B. & C. 516.

‡ Doug. 401.

§ Cald. 196.

THE KING ^{v.} BOLDERO. It is clear, as a general proposition, that not only tithes, but also compensations in lieu of them, are rateable. But it has been argued that we ought, in this case, to consider the tenants of the lands as occupiers of the tithes on a prospective bargain. They cannot, however, be so considered; for by the Act and the award the tithes are extinguished. The compensation is expressly stated to be in lieu of the tithes themselves, and there are no words exempting it from this burthen. I think, therefore, that it was rateable. It is true, that rent of land paid to a landlord is exempt; but it by no means follows that this payment is a rent, although it is called so, and a distress given for the recovery of it.

[473] LITLEDALE, J.:

It appears to me that this money was rateable. The statute 43 Eliz. c. 2, makes a parson liable in respect of the profits which he receives as parson; and I think that he is equally liable in respect of a corn-rent paid by way of composition, as in respect of tithes themselves, the Act of Parliament not containing any express exemption.† The payment is not strictly a rent, although in common parlance it may be so called. Many things are commonly called corn-rents which are not so in reality. It is paid to the rector in lieu of the tithes which are extinguished, but the ability of the rector is not diminished by that extinguishment, and it has been shewn by my brother BAYLEY that the question is not affected by the mode in which the value of the land would be calculated.

Order of Sessions confirmed.

† Cited by COTTON, L. J., in *The Queen v. Christopherson* (1885) 16 Q. B. Div. 7, 15; 55 L. J. M. C. 1, 6.—R. C.

FLINT, GENT., ONE, &C. v. PIKE, &C.†

1825.

(4 Barn. & Cress. 473—484; S. C. 6 Dowl. & Ry. 528; 3 L. J. K. B. 272.)

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In an action for a libel which purported to be a report of a trial, the defendant pleaded that the supposed libel was *in substance* a true account and report of the trial: Held, upon demurrer, that this plea was bad.

Semble that although it be lawful for a counsel in the discharge of his duty to utter matter injurious to individuals, yet the subsequent publication of such slanderous matter is not justifiable, unless it be shewn that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence.

DECLARATION stated, that before the publishing of the libel thereafter mentioned, the plaintiff was an attorney, and had been retained, to bring and prosecute a certain writ and plea of waste in the Court of C. P., in which Thomas Redfern and others were plaintiffs; and Sarah Smith was defendant. It then set out the declaration in waste and the plea, that the defendant had not made any waste; and that issue having been joined on the plea, it came on to be tried at the Derbyshire *Assizes, 1823; and that the jury found that the said Sarah Smith had not made any waste. The declaration then stated, that the defendant, well knowing the premises, &c., but contriving, &c., maliciously published of and concerning the plaintiff, the libel, &c., which purported to be a report of the said trial. The libel professed to give a short summary of the facts of the case; and then stated, that A. B. was counsel for the plaintiffs; and that C. D. was counsel for the defendant; and that the latter was both extremely severe and amusing, at the expence of Mr. Flint, the plaintiff's attorney. It then professed to give a few outlines of the speech of the counsel for the defendant, and the part of the speech set out contained some very severe reflections on the conduct of the present plaintiff, with respect to his having brought the action of waste, and having advised that form of action with a view to his own profit. But the evidence given at the trial was not set out. Plea, that the supposed libel was, in substance, a true report of the trial of the said issue. Demurrer and joinder.

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† Referred to by Mathew, J., *Munster v. Lamb* (1883) 11 Q. B. Div. 588, 594; 52 L. J. Q. B. 726. Cases of this class must now be considered having

regard to the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64). —R. C.

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Manning, in support of the demurrer :

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The plea is bad, because it states that the libel contains a true account of the trial in substance. A party is not at liberty to publish the result of evidence: *Lewis v. Walter*,† *Duncan v. Thwaites*.‡ Neither can he justify publishing what, in his judgment, may be the substance of a trial. But assuming the plea to be good, in point of form, it is no answer to this action. It is true, that an action will not lie for slander spoken, either by a party or a counsel, in the course of a judicial proceeding: **Brook v. Montague*,§ *Hodgson v. Scarlett*;|| but the reason why a counsel acting in discharge of his duty, is privileged when he utters even slanderous matter is, that experience has proved it to be for the advantage of the administration of justice, that counsel so acting should have unlimited freedom of speech. That reason does not apply to any subsequent publication of that slanderous matter, and therefore that is not privileged. Slanderous matter, however injurious to an individual, uttered by a member of parliament, in parliament, is not actionable or indictable; because it is for the public advantage that members of parliament should have unlimited freedom of speech. But the subsequent publication of the slanderous matter, although originally uttered in parliament, has been held to be criminal: *Rex v. Creevey*,¶ *Rex v. Lord Abingdon*.†† Upon the same principle, the subsequent publication of slander, uttered by a counsel in the course of a judicial proceeding, is wrongful, and, therefore, actionable. Supposing such a plea as this not to be bad in itself, and, under all circumstances, as tending to too vague an issue; still, in the present case, it is repugnant to the libel itself, which, upon this part of the record, the defendant admits that he has published. For it is evident, upon reading the libel, that the paragraph could not be, in substance, a true account of the trial.

N. R. Clarke, contra :

As to the form of the plea. The allegation that the libel is,

† 23 R. R. 415 (4 B. & Ald. 605).

|| 19 R. R. 301 (1 B. & Ald. 232).

‡ 3 B. & C. 556.

¶ 14 R. R. 427 (1 M. & S. 273).

§ Cro. Jac. 90; 1 Rolle's Abr. 87

†† 5 R. R. 733 (1 Esp. 226).

(M.), pl. 1.

in substance, a true report of the trial is equivalent to an allegation that it is a *true *report*, for if it had been stated that it was a true report, it would have been sufficient to have proved it true *in substance*. In *Weaver v. Lloyd*,† one of the pleas, to a declaration upon a libel was, that the matters contained in it were true “in substance and effect;” and the Court held, that this must mean that each particular of the charge contained in the libel was true in substance; requiring, therefore, as strict proof as they would have done if the plea had been that the matters contained in the libel were true. Then, as to the other point, *Curry v. Walter*‡ is an authority to shew, that an action cannot be maintained for publishing a true account of the speech made by a counsel, in applying for a criminal information, although the publication be injurious to an individual; and the reason why the publication of the proceedings in courts of justice, though injurious to individuals is lawful, is, that the general advantage to the country in having these proceedings made public, more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings.§

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(BAYLEY, J.: Assuming it to be lawful to give a history of a trial, does it therefore follow that it is lawful to publish every part of it which is injurious to an individual? Is not a party bound to abstain from publishing that part which is injurious to individuals?)

It may be a very nice question, whether a particular matter be so injurious to an individual as to make the subsequent publication of that matter libellous or not; and the editors of newspapers cannot be competent to form a correct judgment upon such *a subject. To hold, therefore, that they must abstain from publishing any part of the proceedings of a court of justice, which contains slanderous matter, would have the effect of preventing the publication of such proceedings altogether: besides, there are many cases where strong observations on the conduct

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† 26 R. R. 515 (2 B. & C. 678). § *Rex v. Wright*, 4 R. R. 649 (8
‡ 4 R. R. 717 (1 Bos. & P. 525). T. R. 293).

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of a witness are properly made by counsel, in the course of a cause. A correct report of the proceedings in such a trial cannot be given without giving those observations. It is important to the public to know, not only the verdict in a cause, but the ground upon which such verdict proceeded, and, in many instances, that verdict may have depended upon the credit given by the jury to a particular witness. It may, therefore, be fit, that the public should be informed of the observations made by counsel, on the testimony of that witness.

(HOLROYD, J. : No facts are stated in the plea to shew that the observations of counsel were warranted.)

It is not a true report, if any thing is contained in it which did not pass at the trial, or if anything is suppressed, which would in any respect have qualified that part which reflects upon the conduct of the plaintiff; but otherwise it is a true report, as far as respects this case, although it may not state every thing which was said upon the trial. The observations here made upon the plaintiff are in respect of his having resorted to an antiquated form of action, and it sufficiently appears from the report that such was the form of action. If any evidence, or other matter omitted in the report would have shewn these observations to have been unfounded, then it is not a true report, and the plaintiff should have taken issue upon the plea. It can never be essential to the *truth of a report, that every unimportant matter should be stated; otherwise the pleadings, &c., must be set out at length.

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BAYLEY, J. :

It may be, and I think is, extremely beneficial that the public should be apprized of many things which occur in courts of justice, and of a great variety of the cases which there undergo discussion. The publication of such cases is lawful, because it is useful to the public, but it does not thence follow that any person is at liberty to publish every thing which occurs in courts of justice, or that he is at liberty to publish not only the whole, but even part of a trial when that part is libellous on an individual. The libel in question purports to set forth a speech of counsel for the defendant, containing many severe observations

on the conduct of the attorney for the plaintiff in the cause. If the evidence had been stated in the libel, the reader of it might have formed his own judgment, how far the observations were well founded. The question is, whether the defendant without detailing the evidence was at liberty to issue to the world this speech of counsel which contained matter injurious to the present plaintiff. The speech of a counsel is privileged by the occasion on which it is spoken; he is at liberty to make strong, even calumnious observations against the party, the witnesses and the attorney in the cause. The law presumes that he acts in discharge of his duty, and in pursuance of his instructions, and allows him this privilege, because it is for the advantage of the administration of justice, that he should have free liberty of speech. But, although for the purpose of the administration of justice, a counsel has that privilege, it does not follow that all persons may afterwards publish *in a newspaper the observations made by him in the course of a cause which are injurious to individuals. Those observations are made in the hearing of numerous auditors, and of the jury, and for the purpose of influencing the latter in their decision. The auditors and the jury have an opportunity of judging how far such observations are warranted by the evidence, but here the publisher of this libel gives his readers no such opportunity. There are cases in which the slanderous matter has been justified by the occasion on which it was uttered, and the subsequent publication of that matter has been held to be actionable, or indictable: *Rex v. Creerey*,† *Rex v. Lord Abingdon*.‡ There the defendants were held to be liable criminally for publishing in a newspaper speeches which they had uttered in Parliament, and that is not a new doctrine, for in the case of *Lake v. King*,§ a petition presented to a committee of Parliament was ordered by the House of Commons to be printed for the use of the members, but it was published elsewhere, and such publication was held to be unjustifiable, because it went beyond that which the privilege of Parliament required. So it seems to me, that the subsequent publication of a speech made by a counsel in the course of a cause containing observations

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† 14 R. B. 427 (1 M. & S. 273).

§ 1 Saund. 120.

‡ 5 R. B. 733 (1 Esp. 226).

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injurious to the character of a party, attorney or witness in the cause, is not lawful, because such publication is not required for the due administration of justice. It is said that it will be a hardship on the proprietors of newspapers, to hold that it is not lawful to publish the speeches of counsel in all cases, inasmuch as they, the proprietors, are not competent to form a judgment as to what is libellous, and what not; *but they ought not to publish any thing, if they are not competent to judge, whether it be injurious to an individual or not. My opinion is that a party is at liberty to publish a history of the trial, viz. of the facts of the case, and of the law of the case as applied to those facts, but that he is not at liberty to publish observations made by counsel injurious to the character of individuals. It was not necessary for the purposes of this cause to go so far as I have done, yet as that, after much consideration, is my opinion, I think it right to declare it. It seems to me that, although the counsel was privileged to speak the matter alleged in this libel, no other person was privileged to publish that matter, and on that ground I think the plea is bad.

HOLROYD, J. :

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I think that the plea which states that the libel is *in substance* a true report and account of the trial, is not a sufficient justification. Notwithstanding the facts disclosed in the plea, it may be perfectly true, that the publication may have been made from the malicious motives alleged in the declaration. Then there is no denial in the plea that the libel was published with such motives, nor are there any circumstances or facts stated to shew to the Court that this publication was for the purpose of giving such information to the public, as it was proper or requisite they should have. With a view to the due administration of justice, counsel are privileged in what they say. Unless the administration of justice is to be fettered, they must have free liberty of speech in making their observations, which it must be remembered may be answered by the opposing counsel, and commented on by the Judge, and are afterwards taken into consideration by the jury, who have an opportunity *of judging how far the matter uttered by the counsel is warranted by the facts proved. There-

fore, in the course of the administration of justice, counsel have a special privilege of uttering matter even injurious to an individual, on the ground that such a privilege tends to the better administration of justice. And if a counsel in the course of a cause utter observations injurious to individuals, and not relevant to the matter in issue, it seems to me that he would not, therefore, be responsible to the party injured in a common action for slander; but, that it would be necessary to sue him in a special action on the case in which it must be alleged in the declaration and proved at the trial, that the matter was spoken maliciously and without reasonable and probable cause. This may be illustrated by the common case of a false charge of felony exhibited before a justice of the peace, there an action upon the case, as for defamation, will not lie, because the slander is uttered in the course of the administration of justice; but the party complaining is bound to allege that it was made without reasonable or probable cause. It by no means follows, however, because a counsel is privileged when, in the course of the administration of justice, he utters slanderous matter, that a third person may repeat that slanderous matter to all the world. The repeating of such slander is not done in the course of the administration of justice, and therefore is not privileged. In *Lake v. King*† the reprinting of a correct copy of a petition to the House of Commons, which had been printed for the use of the members, was held to be illegal. *Rex v. Creevey*,‡ and *Rex v. Lord Abingdon*,§ are also in point to shew that, although *the slanderous matter uttered may be privileged by the occasion on which it is spoken, the subsequent publication of that matter may be criminal. Besides, this plea only states that the report was true *in substance*. I think that is not sufficient; it ought to have stated some facts to shew that it was true in substance; and then it would be for the Court to judge whether it was true *in substance* or not. But I am of opinion that a person is not justified in publishing throughout the kingdom calumnious observations which a counsel in a cause may think it his duty to make. If this plea had proceeded to state any thing to shew

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† 1 Saund. 120.

§ 5 R. R. 733 (1 Esp. 226).

‡ 14 R. R. 427 (1 M. & S. 273).

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that it was material and necessary that the public should be made acquainted, not only with the facts of the case, but with the observations made on them, and had shewn that those observations were warranted, and that the plaintiff deserved the imputation thrown on him, the plea might have been good ; but that would have been a very different plea from the present. I think, therefore, that the plea is defective in point of law, and that there must be judgment for the plaintiff.

LITLEDALE, J. :

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I think that this plea, which states that the libel was *in substance* a true and accurate report of the trial, is not sufficient. By “substance,” I apprehend, is meant the inference which the person who published the libel draws from the whole of what passed at the trial. The plea, therefore, amounts to this, that the libel, in his judgment, is a true account and report of the trial. Now, in my judgment, it appears upon the face of the declaration that the libel does not contain a true and accurate report of the trial, because it neither details the speech of the counsel for the plaintiff nor the evidence, nor *even the whole of the speech of the counsel for the defendant. But even supposing that this had not appeared on the face of the declaration, and that the libel professed to give the speeches of both counsel and the evidence, still I think that this plea, which states that the libel contained in substance a true and accurate report of the trial, is not good in point of form. In an action for a libel, it is necessary to set out in the declaration the words of the libel itself, in order that the Court may see whether they constitute a good ground of action. In *Wright v. Clements*,† a declaration stating that the defendant published a libel, containing false and scandalous matter, “*in substance* as follows,” and then setting out the libel with innuendos, was held to be bad in arrest of judgment, because it professed to give only the general import and effect of the libel, and not a copy of it. For the very same reason, it appears to me that it is not sufficient to state in a plea that the libel is *in substance* a true and accurate report of the

† 22 R. R. 465 (3 B. & Ald. 503).

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trial. I think the plea ought to shew the libel to be a true account and report of the trial. I do not mean to say that it is necessary that the supposed libel should contain every word uttered at the trial, or that unnecessary matter may not be omitted. If issue had been taken on this plea, the jury, in order to decide whether the libel was *in substance* a true report of the trial, would have to consider the relation of all the different parts of the libel to each other, and to say if, upon the whole, it was a fair abstract. Now that would be a most difficult issue to try; but there would be no difficulty if the issue were whether the libel was a true and accurate report of the trial. The question as to the general *right of proprietors of newspapers to publish an account of proceedings in courts of justice, does not necessarily arise in this case. If they profess to give an account of the trial, I am of opinion they ought to give a true and accurate report of the trial; so that the Court, when the record comes before them on demurrer, may see whether it was a trial proper to be published; and, on the other hand, if it goes to issue, that the jury may be able to decide if it be a true and accurate report. I think that the only case in which an editor of a newspaper can justify a libel on the ground that it contains an account of a trial, is where he really gives a true and accurate report of it; and even in that case it will be for the Court to consider whether it was lawful to publish it. I am therefore of opinion that this plea is bad, and that there must be judgment for the plaintiff.

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Judgment for the plaintiff.

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SCRATTON v. BROWN.†

(4 Barn. & Cress. 485—505; S. C. 6 Dowl. & Ry. 536.)

By lease and release dated in 1773, A. B. lord of the manors of M. H. and P. P. bargained and sold unto C. D., E. F. & G. H. all that messuage, tenement, boat-house, &c., and also all that and those the sea-grounds, oyster-layings, shores, and fisheries of him A. B., commonly called and known by the name and names of M. H. and P. P. shores or sea-grounds, with full and free liberty to C. D., E. F. and G. H. and their heirs and assigns for ever to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same; which said sea-grounds, oyster-layings, shores, and fisheries, extended from the south at low-water mark, to the north at high-water mark, and from certain sea-grounds on the east to other sea-grounds on the west. And all which said sea-grounds, oyster-layings, shores, and fisheries thereby granted, released, &c., contained in the whole by estimation 800 acres of land covered with water, or thereabouts, as the same were beacons, marked, and stubbed out. Reservation to the grantor, his heirs, and assigns, lord of the two manors, of all manner of fish-royal, and all wrecks of the sea, flotsam, jetsam, and ligan within the said manors, and all manner of franchises. And by the tenendas the grantees were to hold the messuage, tenement, and boat-house, sea-grounds, oyster-layings, shores or fisheries, hereditaments and premises, with the appurtenances, of the grantor, lord of the two manors, by such suit of court, and other services as were or of right ought to be done and performed by other the freehold tenants of the same respective manors seised of estates of inheritance in fee: Held, that by this deed the right of soil in the sea-shore passed to the grantees.

It appeared that since the date of the deed the sea had imperceptibly and gradually encroached upon the land, and consequently that the high and low water mark had varied in the same degree. It was held, that by the deed the right of soil in that portion of land which from time to time lay between high and low water mark passed to the grantees.

TRESPASS for breaking and entering three closes of the plaintiff, situate in the parish of Prittlewell, in the county of Essex, being respectively to the southward of the cliff, and part or parcel of the now beach or shore, and with spades, &c., turning up the soil of the said closes, and taking and carrying away large quantities of shingle and stones, and converting the same to the defendant's use. Plea, not guilty. At the trial before Graham, B., at the Spring Assizes for the county of Essex, 1825, it appeared that the plaintiff was tenant for life of an estate at Southend and Prittlewell, bounded on the south by the sea,

† Cited as "a very important *Hindson v. Ashby*, '96, 2 Ch. 1. 11, authority" by LINDLEY, L. J., in 65 L. J. Ch. 515, 519.—R. C.

and that he was also lord of the manors of Middleton Hall and Prittlewell Priory. The defendant was a manufacturer of Parker's cement, and had, at different times, taken stones for the purpose of *making the cement, from the sea-beach and sea-shore adjoining the plaintiff's manors. Some of them had been taken between high and low-water mark, and some had been taken above high-water mark. The plaintiff, in order to shew that the space between high and low-water mark belonged to him, proved that from time to time he had exercised acts of ownership there. The defendant took the stones under the authority of one Taylor, in whom was vested an interest in the shore conveyed by the plaintiff by lease and release, bearing date the 27th and 28th September, 1773, to T. Lee, D. Harridge, and W. King. The release was made between those persons and D. Scratton, the present plaintiff, described as eldest son and heir-at-law of D. Scratton deceased. It recited that by lease and release of the 17th and 18th January, 1770, and by a recovery suffered in pursuance thereof, in Hilary Term, 10 Geo. III., the messuage, tenement, or boat-house, sea-grounds, oyster-layings, shores, fisheries, and hereditaments thereafter mentioned, amongst other hereditaments therein comprized, were conveyed and assured, or intended so to be, unto and to the use of the said D. Scratton (deceased), his heirs and assigns for ever; and that D. Scratton had contracted with T. Lee, D. Harridge, and W. King for the absolute sale to them and their heirs of the said messuage, tenement, boat-house, sea-grounds, oyster-layings, shores, fisheries, and hereditaments, for the sum of 6,000*l*. The indenture then witnessed, "that in pursuance of the recited contract, and in consideration of the sum of 6,000*l*., paid as therein mentioned, which was agreed to be the full consideration-money for the absolute purchase of the messuage, tenement, or boat-house, sea-grounds, oyster-layings, shores, fisheries, and premises, he the said *D. Scratton had bargained, sold, released, &c., unto the said T. Lee, D. Harridge, and W. King, in their actual possession then being, by virtue of a bargain and sale made to them, the day next before the date of the release, for one year, and to their heirs and assigns, all that messuage, tenement, or boat-house, with the gardens, stables,

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outhouses, and buildings thereunto belonging, situate at a place called Southend, in the parish of Prittlewell aforesaid; and also all that and those sea-grounds, oyster-layings, shores, and fisheries of him the said D. Scratton, commonly called by the name or names of Milton, otherwise Middleton Hall and Prittlewell Priory shores or sea-grounds, or by the name of one of them, or by whatever name or names the same were or had been theretofore called or known, situate, lying, and being in the parish of Prittlewell aforesaid, or in some other parish or parishes thereunto next or near adjoining, with full and free liberty to and for the said T. Lee, D. Harridge, and W. King. and their heirs and assigns for ever, to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same, at their and every of their free wills and pleasures; which said sea-grounds, oyster-layings, shores, and fisheries did extend from the south, at low-water mark, to the north at high-water mark, and abutted west, towards Leigh aforesaid, upon the lands or sea-grounds of E. Tyrrel, Esquire, called Chalkwell Hall, and towards the east upon the sea or oyster-grounds of Thomas Drew, Esquire, in the said county of Essex; and all which said sea-grounds, oyster-layings, shores, and fisheries thereby granted, released, and conveyed and mentioned, or intended so to be, did contain in the whole, by estimation, 800 acres of land covered with water, or thereabouts, as the same were *beaconed, marked, and stubbed out, and were then in the tenure or occupation of the said T. Lee, D. Harridge, and W. King, their under-tenants or assigns, together with all and all manner of ways, &c. (saving, except, and reserving unto the said D. Scratton, his heirs and assigns, lord or lords of the respective manors of Prittlewell Priory and Milton, otherwise Middleton Hall, out of the grant and conveyance thereby made, all and all manner of fish-royal, and all wrecks of the sea, flotsam, jetsam, and ligam, within the said respective manors, or either of them; and also all and all manner of franchises, royalties, jurisdictions, perquisites, and profits of courts, and all other manorial rights and privileges whatsoever to him the said D. Scratton, as lord of the said manors, or either of them, belonging or appertaining, as fully and amply as the same were then used, exercised, and enjoyed

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by him in respect of other the freehold tenants of the said respective manors seised of estates of inheritance in fee simple); and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of all and singular the said premises, and of every part and parcel thereof, and all the estate, &c.; to hold the said messuage, tenement, or boat-house, sea-grounds, oyster-layings, shores, and fisheries, hereditaments and premises thereby granted or released, or intended so to be, and every part and parcel thereof, with their and every of their rights, members, privileges, hereditaments, and appurtenances, unto the said T. Lee, D. Harridge, and W. King, their heirs and assigns, as to one full undivided third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said T. Lee, his heirs and assigns for ever; and as to one other full undivided *third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said D. Harridge, his heirs and assigns for ever; and as to the remaining one full undivided third part of all and singular the said hereditaments and premises, to the only proper use and behoof of the said W. King, his heirs and assigns for ever, and to or for no other use, intent, or purpose whatsoever; to be holden as to such part of the said hereditaments and premises thereby granted and released, as did lie within the said manor of Prittlewell Priory, of the said D. Scratton, party thereto, his heirs and assigns, lord or lords of the same manor; and as to such part of the said hereditaments, thereby granted and released, as did lie within the manor of Milton, otherwise Middleton Hall, of the said D. Scratton, his heirs and assigns, party thereto, lord or lords of the same manor, by such suit of court or other services, as were of right, and ought to be, done and performed by other the freehold tenants of the same respective manors, seised of estates of inheritance in fee."

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At the trial it was proved that, since the date of the deed, the sea had gradually encroached upon the land, according to the testimony of some of the witnesses twelve or fifteen feet, according to the testimony of others much more, and, consequently, that the present high and low-water mark had advanced in the same degree inland since that time. There was some evidence

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to shew that the shore on the north and south had been formerly beacons out. It was contended on the part of the defendant, that the deed of the year 1773 conveyed to the grantees the soil of the shore between high and low-water mark, wherever those marks might be. On the part of the plaintiff it was contended, first, *that the deed did not convey the soil, but a mere privilege or easement of fishing, and laying oysters there; and, secondly, assuming that the deed did convey the soil, it conveyed only that part of the shore, which, in the year 1773, lay between high and low-water mark, and, consequently, that the plaintiff was entitled to recover for any stones taken by the defendant higher up on the shore than the high-water mark reached at that time. The learned Judge was of opinion, that the deed did not convey the soil of the shore to the grantees, but a mere right of fishing and laying oysters there, and under his direction the jury found a verdict for the plaintiff, subject to a reference as to the amount of the damages. *Taddy*, Serjt. in Easter Term obtained a rule *nisi* for a new trial, upon the ground that the deed did convey to the grantees the soil of the shore.

Marryat, Gurney, Comyn and Andrews now shewed cause :

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The deed passed a mere easement or privilege, a right of fishery, and of laying and taking oysters on the shore; secondly, assuming that it passed an interest in the soil of the shore, still it could only convey the right of soil in 800 acres, described as bounded on the north and south by the then high and low-water marks. As to the first point, the deed in the first instance grants "all that messuage, tenement, and boat-house, and all those sea-grounds, oyster-layings, shores, and fisheries, called Middleton Hall and Prittlewell Priory sea-grounds and shores." The grantor only gives a qualified right in the shore for a particular purpose. The word oyster is connected with the three subsequent words, and, therefore, this part of the deed must be construed to operate as a grant of the oyster-shores, oyster-layings, *and oyster-fisheries, and there then follows an express liberty to the grantees to fish, dredge, and lay oysters, and to take and carry away the same. Now, that liberty would have been wholly unnecessary, if the soil was intended to pass

by the former words, for in that case the grantee would have had a right to use it as he thought fit. It is true, that the words "sea-grounds," by themselves, would have been sufficient to pass the right of soil in the shore, but the whole of the grant must be construed together, and the words "sea-grounds" must be taken to pass an interest in the sea-grounds, sufficient to enable the grantees to exercise their right of fishing, laying, and taking oysters. The reservation of fish-royal, wreck of the sea, flotsam, jetsam, and ligan, throws no light upon the construction of the deed, because those being prerogative rights would not pass, except by express words.

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Secondly, assuming that a right to the soil did pass by the deed, it could only be a right of soil in that land, which in the year 1773 was bounded by the high and low-water marks. It is specifically described by abuttals, and "as containing by estimation 800 acres, covered with water, as the same were then beacons, marked, and stubbed out." The land granted, therefore, was a specific quantity of land, ascertained by certain marks, and the plaintiff now claims other land not within those marks. He claims, in fact, a moveable freehold; but there cannot be such a thing as a shifting freehold, and a deed professing to grant such an estate would be void for uncertainty.

Taddy, Serjt., Preston and Knox, contra :

The deed must be construed with reference to the intention of the *parties at the time when it was executed, and the question will be, what the one intended to convey, and the other intended to purchase. The deed may be considered as consisting of five parts. The first part containing the substantial part of the grant, beginning with the grant of the messuage and tenement; the second, with the words, "with full and free liberty to fish;" the third beginning with the words "which said sea-grounds," containing a description of the things granted; the fourth, containing an additional description, beginning with all the words "which said sea-grounds contain;" and the fifth the tenendas.† Now the premises granted are "the messuage, tenement, or boat-house, &c., and also all that, and those the sea-grounds,

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† *Quasi diceret prae dictas terras.*—F. P.

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oyster-layings, shores, and fisheries, called Middleton Hall and Prittlewell Priory shores or sea-grounds." The word "sea-grounds" in a grant would of itself be sufficient to pass the soil. If a man grant all his woods, not only the woods growing upon the land, but the land itself passes, for the word "woods" includes not only the trees, but also the land whereon they grow:† *Whistler v. Paslow*.‡ Supposing those words not to be sufficient to pass the soil, it passes by the words "sea shore," which denote this land which is covered with water at high tide, and left uncovered with water at low tide.§ The words "sea-grounds and sea-shores" have a certain definite meaning, which is not to be narrowed by the subsequent introduction of the unnecessary words "oyster-layings and fisheries." Effect must be given to all the words of the grant. Now, if the construction contended for by the plaintiff prevails, no effect will be given to the words sea shores. It is argued that the grantor intended* to convey only a given quantity of land, marked out by certain fixed boundaries on the east and west, and the high-water mark and the low-water mark on the north and south, in the year 1773; but this is a mere addition to the description of the subject matter of the grant, which is sufficiently described in the former part of the deed. Now it is a general rule in the construction of deeds, that, if the subject matter of the grant be once sufficiently described in the deed, an error made in an addition to the description will have no effect: *Wrotesley v. Adams*,^{||} *Swift v. Eyres*.¶ Here, in the former part of the deed, the subject matter of the grant was sufficiently described by the words, "all those sea-grounds, oyster-layings, shores, and fisheries called by the name of Middleton Hall and Prittlewell Priory shores, or sea-grounds, and bounded on the east and west as therein described, and on the north and south by high and low-water mark." If, therefore, the space between high and low-water mark had comprehended 1,000 acres instead of 800, they would have passed by the grant. The deed then contains a reservation, out of the grant, of fish-royal, wreck of the sea,

† Co. Litt. 4, b.

‡ Cro. Jac. 487.

§ Callis on Sewers, 54.

|| 1 Plowden, 191.

¶ Cro. Car. 546.

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flotsam, jetsam, and ligan; now such a reservation would be wholly unnecessary if the former part of the deed had passed an easement only. Then by the tenendas the grantees are to hold the boat-house, sea-grounds, &c., with their appurtenances, of the lord of the two different manors, by such suits of court and other services as of right ought to be done and performed by other the freehold tenants of the manors seised of estates of inheritance in fee; and it is obvious, *from the reservation of the tenure as to two different manors, that the tenendas applied to the oyster-grounds, and is not confined to the boat-house. By the Statute of Westminster 2nd, the feoffee must hold the lands of the chief lord of the fee, and by the same services and customs as his feoffor had held them before. It is evident, therefore, from this clause of the deed, that the land between high and low-water mark was to be held, (though, in consequence of this statute, it could only be held of the superior lord, and not of the grantor as mesne lord,) for the lands only and not an incorporeal hereditament or easement could be held, an incorporeal hereditament not lying in tenure. Then, assuming that the deed conveyed a right of soil in the shore, it conveyed such a right in that portion of land which from time to time should constitute the sea shore, and not merely in that portion of land which constituted the sea shore in 1773. It has been said that there cannot be such a thing as a moveable freehold, and that this grant is void for uncertainty. But in Co. Litt. 48 b it is laid down, that where a person has a moveable estate of inheritance in thirteen acres of land, parcel of a meadow of eighty acres, he may convey it by the description of thirteen acres lying within the meadow of eighty acres. That is an authority, therefore, to shew that there may be a moveable freehold, and that the description in the present case is sufficiently certain. The uncertainty in the description, if any, arises wholly from the uncertainty of the subject matter granted. Then, if there may be a moveable freehold, and it is sufficiently described, the question is, what was intended to pass. Now, it is clear, from the whole deed, that the grantor intended to part with all his interest in the *shore which he himself had derived from the Crown. According to the late case of *The King v.*

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Lord Yarborough,† and the passages from Lord Hale's treatise *De Jure Maris*, there cited, it is established that land formed by the sea, by slow, gradual, and imperceptible accretion, *primâ facie* belongs to the Crown, or the grantee of the Crown. Inasmuch, therefore, as the shore, or the space between high and low-water mark, has been slowly and imperceptibly altered by the encroachment of the sea, the shore so altered would belong to the Crown, and of course to its grantee, and, therefore, now belongs to those who claim under the deed of 1773.

BAYLEY, J. :

This action is brought upon the supposition that the deed of 1773 conveys a privilege and an easement only in the waste ; and leaves in the grantor the general property in the soil, from low to high-water mark. If we are satisfied from the language of the deed that the soil passes, then the present verdict, to the extent to which it has been given, cannot be supported. It appears to me, that the deed does pass to the grantee, not a mere privilege or easement, but the soil, so far, at least, as the surface was concerned. The property is of a peculiar description, viz. land lying between high and low-water mark. The property in such land, *primâ facie*, is in the Crown. It may, however, be in a subject, and different rights in that description of property may be vested in a subject, according to the terms of the grant. The King may have granted to a subject the soil itself, or the general privilege of fishing, or of laying, keeping, and taking oysters on that spot. *The rights, therefore, of the grantor, in this case, must depend upon the rights which he derived from the Crown. If he intended to part with all that he had, and the extent of his rights were doubtful, he would probably use, in his conveyance, language calculated to pass every description of property which he at that time might possess. The deed purports to pass "all that and those, sea-grounds, oyster-layings, shores, and fisheries." If it had conveyed the sea-grounds only, that, *primâ facie*, would have operated as a grant of the soil itself. For, generally speaking, the soil passes by the word "ground ;" as, by the word "wood,"

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† 27 R. R. 292 (3 B. & C. 91).

the soil in which the wood grows passes. If the grantor had intended to pass a limited specific privilege and easement in the soil, and not the soil itself, he ought not to have used such comprehensive words, but words limited and restricted in their sense. It seems to me, therefore, that if the grant had contained only the words "sea-grounds," they would have passed the soil. But then, the words "oyster-layings" are introduced, and it is said, that from these words it is to be inferred that, by the words "sea-grounds," it was intended to convey a privilege of laying oysters only. I think, however, that those additional words may have been introduced because the grantor was uncertain as to the nature of the right which he had actually derived from the Crown. Then comes the word "shore," which denotes that specific portion of the soil by which the sea is confined to certain limits. That term is wholly inapplicable to the grant of a privilege or easement; it of necessity comprehends the soil itself. But the word "fishery" immediately follows, and it is said that there could be no reason for introducing the word "fishery," if the soil itself had been *previously granted. I have already observed that the grantee of the Crown might either have had the soil, or the fishery, or the mere privilege of laying and taking oysters; or he might have taken the soil from the Crown by one grant, and the fishery by another; and, in either case, it might have been a matter of doubt whether he had the right to the soil or a mere easement. It certainly would require very clear language to qualify the effect of the words "sea-grounds," "oyster-layings," and "shores;" and if I held that these words were qualified by the word "fishery," I should limit the effect of words which have a certain definite meaning by a word apparently introduced for the purpose, not of limiting the grant, but of including any additional right which the grantee might possess. Then follow the words, "with full and free liberty for the grantees to fish, dredge, and lay oysters thereon, and from thence to take and convey the same." Now it has been said that if the soil had been previously granted, these privileges would have been incident to the grant of the soil, and, therefore, that the grant of these privileges shews that the soil was not previously granted. The liberty, however, is equally

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useless, whether the previous part of the deed conveyed the soil, or an easement only. The deed then excepts all manner of fish-royal. Such an exception might be material, for the grantee of the Crown having previously granted the fishery, would have thereby conveyed any right that he had to fish-royal, unless there had been an exception in that respect. The exception of wrecks, flotsam, jetsam, and ligan was wholly useless, for those being prerogative rights, would not pass without express words introduced for that purpose. If those words have any effect, it is in favor of the defendant, for it is quite clear *that if the grantor had intended to pass a privilege only, it would have been unnecessary to introduce them. Upon the whole of this deed, I am of opinion, that it must be construed to convey not a mere privilege and easement, but the soil itself.

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That being so, the second question is, what soil did it convey? There is no dispute as to the limits on the east and west, but merely as to those on the north and south. It has been contended on the part of the plaintiff, that it does not convey that soil which from time to time is bounded by the high and low-water marks, but only that soil which at the time when the deed was executed was bounded by the then high and low-water marks. Now the passage cited from the 1st Inst. 48 b, shows that there may be a moveable freehold. It does not apply specifically to this case, because the case put there is of a given quantity of land fixed in situation, of which part from time to time may be vested in A. and the other part vested in B.† The question here is, whether there may be a certain quantity of land shifting in situation and vesting in the same persons at different times? That must be the case of land fronting the sea or a river, where, from time to time, the sea or river encroaches or retires. If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore there belongs. The land between high and low-water marks originally belonged to the Crown, and can only vest in a subject as the grantee of the Crown. The Crown by a grant of the sea-shore would

† The real application in practice was to shifting portions in lot meadows, of which there are many examples in old terriers and estate

maps: thus a meadow would be divided into odd and even numbered strips, the lord and the tenants taking each set in alternate years.—F. P.

convey, not that which at the time of the grant is between the high and low-water marks, but that which from time to time shall be between these two termini. Where the grantee has a freehold in that *which the Crown grants, his freehold shifts as the sea recedes or encroaches. Then what was the object of the parties to the deed of 1773? To grant the land within certain limits. Those to the east and west were ascertained, but those on the north and south were to be ascertained by the high and low-water marks. I think that those words must be construed with reference to the rule of the common law upon the subject of accretion, and that as the high and low-water marks shift, the property conveyed by the deed also shifts. For these reasons I am of opinion that the plaintiff was not entitled to recover in respect of any part of the stones which were proved to have been taken between high and low-water marks.

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HOLROYD, J. :

I am clearly of opinion, that the right to the soil passed by the deed. I think that the first part of the grant must be taken to operate as a conveyance of corporeal hereditaments (supposing always that the person assuming to convey had a right to convey corporeal hereditaments), and that the subsequent part of the deed operated as a conveyance of incorporeal hereditaments. Whether the grantor had or had not these corporeal rights, which he assumed to have, I think that the words, " with liberty to fish, &c." may have been introduced to remove all doubts as to the nature and extent of the rights granted. It is possible, that at some former period the right in the soil of the shore, and the right of fishing on the shore, may have existed in different persons, before they both vested in the grantor; and, therefore, that it may have been a matter of doubt, whether one was merged in the other. I think that the additional words were intended as words of amplification, *and that they ought not to operate as words of restriction. In a deed, if the grantor do not mean to grant that which the words used in their technical meaning import, it is his duty to qualify those words; and if there be a reasonable doubt what the intention actually was, then such a construction is to be given to the deed as would be rather

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against the grantor than the grantee. Previous to the granting part of the deed there is a recital, that a recovery had been suffered of, amongst other things, the tenement, messuage, and boat-house, the sea-grounds, oyster-layings, shores, fisheries, and hereditaments thereafter mentioned, and that they were comprized in a settlement there referred to. It then recites, that the grantees had consented and agreed for the absolute sale of the messuage or tenement, &c., and the sea-grounds, oyster-layings, shores, and fisheries, and hereditaments thereafter more particularly mentioned. Those are the sea-grounds, oyster-layings, shores, &c., which had been comprized in the recovery before. If they were corporeal tenements, the recovery would operate upon them, and they might have been demanded in a præcipe, but if they were not corporeal tenements they could not be demanded in a præcipe; they might pass as appurtenances, but would not themselves be the principal subject on which the recovery would operate, and it would only affect them, because it operated on other subjects to which they bore relation. Then by the granting part, "all that messuage, tenement, boat-house, &c., and also those sea-grounds, oyster-layings, shores, and fisheries," known by the particular names thereafter mentioned were conveyed. These terms import that corporeal tenements were conveyed, *and they are not to be narrowed and restrained, unless there is something to shew that such was the intention of the parties. Then the deed grants "full and free liberty for the grantee to fish, dredge," &c. That part of the grant was wholly unnecessary, for that privilege would pass under the words "sea-grounds and shores." If, however, the right of fishing continued to exist as a distinct privilege, and was not merged in the general right of the soil, these words would be useful to pass it, or if it were at all doubtful, whether it existed or not as a distinct privilege, they remove all doubt as to the intention to pass that privilege. Supposing the grantor's title to the sea-grounds was invalid, and he had the right of fishery, but not the soil, these words might be useful as granting the incorporeal right, although the grant would be void as to the corporeal right. They do not, therefore, shew any intention on the part of the grantor, that the corporeal right should not pass pursuant to the technical language of the former part of the grant.

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In a grant, it is not very material which of the parts stands first, and which last. Suppose that there had been a grant, "of full and free liberty to fish, dredge, and lay oysters, together with the sea-grounds," it could not be contended that the latter words would have no effect. They would operate as a grant of a corporeal tenement. The deed then proceeds, "with all the rents, issues, and profits of all and singular the said premises." All the issues and profits of what was before granted were to be taken, and not merely a particular profit arising from the right of getting fish. The grantor, therefore, uses extensive and sweeping words to shew that he meant to *convey all that he could, with reference to the subject-matter of the grant, and I am clearly of opinion, that the instrument was sufficient to pass the soil.

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With respect to the other question, I am of opinion that supposing the soil to be granted, it follows as a consequence, that the grantee, with respect to the shore, will stand in the same situation as the grantor would have stood, if he had not executed the deed. The grantor conveyed the whole of his shore between particular boundaries; he had, therefore, no part of it remaining in him, and the grantee stood in his situation. Then the accretion follows as an accessory to the principal. The change being gradual it becomes part of the shore, and belongs to the person who has the shore at the time when the accretion takes place. I think, therefore, that there should have been no new trial in this case, if it had appeared that all the stones had been taken from the shore. But as some of them were taken from the cliff above the high-water mark, a new trial must be granted, unless the parties can come to some arrangement upon the subject.

LITTLEDALE, J. :

It seems to me that by this deed, the soil is passed not only in the 800 acres which were described in the deed, but also in any other land between high and low-water mark, imperceptibly added by accretion. Upon the construction of the deed, it is clear that if the words sea-grounds had stood alone, the soil would have passed under them. Sea-ground is either ground bordering on the sea or covered with the sea. The word "ground" itself is sufficient to pass the soil, and the word "sea" annexed to it only shews where it is situate. *The next

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words "oyster-layings" would not of themselves pass the soil, but the word "shores," unconnected with other words, would pass the soil. It is said, however, that that word is to be coupled with the word "oyster," and, therefore, that the deed only imported to convey oyster-shores. I see no reason why they should be coupled together; but supposing it to be so, that would not make it less a shore, and that would be sufficient to pass the soil. It would only denote the purpose to which the land was applied, viz. that it was a shore where oysters were got; just as the words arable land, pasture land, wood land, denote the purposes to which the land is applied. Then as to the word "fisheries," it is said, that with that word "oyster" must be coupled: but I do not know why they are to be connected together. It may, indeed, be said that the word "fishery" is unnecessary, for if the soil passed the fishery passed also, but that is not so. A fishery in a river would pass by the conveyance of the adjoining land, because of common right it might be incident to the soil, but in this case it was absolutely necessary to grant the fishery, for the grant of the soil would not be sufficient to convey a peculiar privilege to fish between high and low-water mark, because all the King's subjects would have a right to fish there, unless a particular person was entitled to it by specific grant or prescription. The fishery, therefore, would not pass by the word "soil;" and supposing that the soil passed by the deed, the word "fishery" might nevertheless be properly introduced to give the privilege of fishing. Perhaps even the words "oyster-layings" would not pass the privilege of getting oysters; because those words only import a privilege of laying oysters *there, and it might be doubtful whether it would give a right to take them. But then the words are "all those sea-grounds called by the name of Middleton Hall Shores and Sea-Grounds;" so that the grant applies to some shores called by a particular name. It is evident, therefore, that they were the grounds and shores which had been granted before. Then come the words "full and free liberty to fish," &c. Now, supposing that liberty to have been accessory to the grant of the soil, it is clear that the unnecessary addition of those words does not restrict the grant, but only explains the intention of the parties: *The Earl of Cardigan v.*

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Armitage.† By the grant of the soil the party has no peculiar right to fish; but he might have a right to fish, dredge, and lay oysters by a grant of the fishery. Then, in the exception, there are no words which have any bearing on the present case; but there is one which is insisted upon, “except fish royal.” Now it was necessary to except them, for otherwise they would be conveyed; for the exception implies that, but for that exception, the thing was before granted.

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Then, supposing the soil passes, the other question is, whether it is to be confined to the 800 acres mentioned in a subsequent part of the deed? Now the grant is of those sea-grounds which went by the name of Middleton Hall Shores and Sea-Grounds. Therefore, the only subject of enquiry is, whether the place in question, from whence the stones have been taken, is called by either of those names; for the subject-matter of the grant cannot be affected by the subsequent part of the deed, which has nothing to do with the grant, but is merely matter of *description. The distinction is well established, that where there are words sufficient to pass property in the first instance, and there are in a subsequent part of the deed words of affirmation, these latter words, though they may be wrong in point of description, do not affect the previous part of the grant. The words are, “which said sea-grounds,” &c. (after description of their boundaries on the north and south by high and low-water mark, and on the east and west by the grounds of particular persons) “do contain, on the whole, 800 acres of land covered with water.” Now these words of suggestion or affirmation may be true or false. Instead of 800 acres there might have been 5,000 acres, and it is quite immaterial whether they were bounded on the east and west by the lands of the persons mentioned in the deed; because, in the operative part of the grant, the sea-grounds are the thing granted, and the latter words will not vitiate that grant, which extends to all the shores going by the name of Middleton Hall Shores and Sea-Grounds. The only remaining question is, whether the accretion which has taken place passes by that grant. I think it quite clear, from the case of *Rex v. Lord Yarborough*, and Lord Hale’s treatise *De Jure Maris*, that the increase being imperceptible, continued to pass as incident

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† 26 R. R. 313 (2 B. & C. 197).

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to that which belonged to the grantee. Upon that principle, I am of opinion that the land between high and low-water mark constitutes a part of Middleton Hall Shores, or sea-grounds, and that the deed is sufficient to pass the accretion which has taken place.

Rule absolute for a new trial.

The amount of damages was referred to a barrister.

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(4 Barn. & Cress. 506—516; S. C. 6 Dowl. & Ry. 567; 3 L. J. K. B. 270.)

In an action upon a promissory note against a party who had indorsed it for the accommodation of the maker, it appeared that the plaintiff, the indorsee, had signed an agreement to accept from the maker of the note 5s. in the pound in full of his demand, on having a collateral security for that sum from a third person. It further appeared that the agent of the maker had represented to the plaintiff before he signed the agreement that the defendant would continue liable for the residue of the debt secured by the note, and that the agreement would be void unless all the creditors signed. Held, first, that the execution of this agreement had the effect of discharging the surety; secondly, that the representations being as to the legal effect of the agreement, were immaterial, and had not the effect of avoiding it, and that as the latter of them gave to the agreement a meaning different from that which appeared upon the face of it, parol evidence of that representation was not admissible, per BAYLEY, J.

THIS was an action on a promissory note for 150*l.*, dated the 15th of March, 1821, made by one William Walter Jones, payable two months after date to the defendant, and by him indorsed to the plaintiff. At the trial before Garrow, B., at the last Spring Assizes for the county of Hereford, it appeared that William Walter Jones, the defendant's brother, being indebted to the plaintiff, the defendant G. B. Jones, for the accommodation of his brother, became a party to the note in question. It was proved by a witness who, on behalf of the plaintiff, had applied to the defendant for payment after the note became due, that he had said he would call and settle it, but at the same time asked the witness to request the plaintiff to suspend proceedings until an investigation of his brother's affairs had taken place, and that he should be much obliged to the plaintiff if he would get what he could from his brother, and relieve him, the defen-

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dant; that, at a subsequent time, the witness saw the defendant again, and told him that the plaintiff would have nothing to do with his brother, as he had left the country, and that he should look entirely to the defendant; that the defendant then said that one Morgan, an auctioneer, had investigated his brother's affairs, and had ascertained that there would be five shillings in the pound for the creditors. *It was further proved by the same witness, that the plaintiff and defendant afterwards met together, and that the defendant told the plaintiff that as he had signed an agreement for a composition of five shillings in the pound, he was not entitled to the whole debt, but that the defendant would give him a note for fifteen shillings in the pound: that the plaintiff then said that he had signed the agreement for composition, on the understanding that all his brother's creditors would come forward and sign the agreement, and accept the composition; but that as they had not done so, he considered the agreement to be null and void. It appeared further, on the cross-examination of this witness, that the plaintiff told him he had signed the agreement for composition on the faith of the promise of the defendant that he would pay the remaining fifteen shillings in the pound. For the defendant it was proved that, at a meeting of William Walter Jones's creditors, on the 29th May, 1824, the plaintiff signed the following paper: "We, the undersigned creditors of William Walter Jones, agree to accept of five shillings in the pound in full of our original demands against him, on having a joint note from him and his father, William Jones, payable in twelve months from the date hereof." The father and W. W. Jones gave their joint note to the plaintiff, in pursuance of the agreement. Another witness swore that Morgan, as agent of W. W. Jones, at the meeting of creditors convened for the purpose of signing the agreement for composition, stated that unless all the creditors signed, the paper was to go for nothing; and that the defendant, notwithstanding that the plaintiff signed the agreement, would continue liable for the residue of the debt, secured by his note. The learned Judge told the jury to *find for the plaintiff, if they thought that he was induced by any false representation to sign the agreement, otherwise to find for the defendant. The jury

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having found a verdict for the plaintiff, a rule *nisi* for a new trial had been obtained in last Easter Term, upon the ground that by the agreement for composition, and the plaintiff's acceptance of the joint note from W. W. Jones and the father, the original debt was extinguished, and that the surety was therefore discharged.

Russell and R. V. Richards now shewed cause :

The debt due from the defendant to the plaintiff upon the promissory note was not extinguished by the agreement for composition. At the time when the agreement was signed, the note was an existing security, and there was no stipulation that it should be given up. On the contrary, there was an express undertaking by the defendant that it should continue in force against him, and a request by him that the plaintiff would obtain all he could from the principal debtor. It is true that a creditor, by entering into a composition with the principal debtor, without consent of the surety, discharges the latter : yet that rule is founded on the principle that it is against conscience that persons should be placed in a situation in which they have not contracted to be placed. Here the surety had contracted to be placed in that situation. There is no doubt that if a new security had been given for the payment of any thing beyond the composition money, it would have been void: *Cockshott v. Bennett*,† *Stock v. Mawson*.‡ But this is more like the case of *Thomas v. Courtenay*,§ where the creditors of an insolvent agreed by an instrument (not under seal) that they would *accept, in full satisfaction of their debts, twelve shillings in the pound, payable by instalments, and would release him from all demands, and it was held that the agreement did not extinguish the debt, and did not discharge a surety for it. Besides, here the question as to the extinction of the debt does not arise, for the jury have found that the plaintiff was induced to sign the agreement by a delusion practised upon him. It is clear that a creditor is not bound by an agreement for composition, if any misrepresentation has been used to obtain his consent: *Cooling v. Noyes*.|| Now here there were two most material misrepre-

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† 1 R. B. 617 (2 T. B. 763).

‡ 1 Bos. & P. 286.

§ 1 B. & Ald. 1.

|| 6 T. B. 263.

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sentations made by the agent of the principal; first, that the surety would continue liable for the residue of the debt secured by the promissory note, notwithstanding the agreement for composition; and, secondly, that the agreement would be void, unless all the creditors came forward and signed. Now, if the original debt was extinguished (as contended by the defendant) the first representation was false. In fact, several of the creditors did not sign, and, if the agreement be valid, the second representation also was false, and such misrepresentations make the deed void *ab initio* on the ground of fraud.

(BAYLEY, J. : Is not the effect of these representations to shew the legal effect of the instrument to be different from what it appears to be, and if so, were they admissible in evidence?)

The representations tend to shew that the agreement is void *ab initio* on the ground of fraud, and, therefore, that it has no legal effect whatever.

W. E. Taunton and Campbell, contra :

In *Cockshott v. Bennett*,† one of the creditors, before he executed the *agreement for composition, obtained from the insolvent a promissory note for the residue of his debt, and that was held to be void, inasmuch as it was a fraud on the other creditors, who had mutually contracted with each other, that the insolvent should be discharged from his debts, after the execution of the deed. Now the defendant in this case could only be liable to pay the debt in default of its not being paid by his brother. The effect of the composition, therefore, was to make the defendant's liability absolute, which before was only contingent. The defendant in case of paying this note to the plaintiff would have his remedy over against W. W. Jones for money paid, this being an accommodation indorsement. Then the stipulation, that the debt should continue, was a fraud upon the father, who gave his promissory note on the faith that it was to be received in full discharge of his son W. W. Jones. He was no party to that new contract, and, therefore, cannot be bound by it. In *Thomas v. Courtenay*,‡ the security held to be available was an

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† 1 R. R. 617 (2 T. R. 763).

‡ 1 B. & Ald. 1.

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acceptance of a bill drawn by the principal debtor, and an acceptor is *prima facie* the debtor of the drawer; and in that case BAYLEY, J., said, "if it could be made out that Colonel Gower had a remedy over against Baker and Son, that might have varied the case." Assuming that the defendant is discharged by the general law on this subject, the representations made that he would continue liable, notwithstanding the signing of the agreement by the plaintiff, and that the agreement would be nugatory unless all the creditors signed, are immaterial, because, at most, they are representations merely as to the legal effect of the agreement, of which every party is presumed to be cognizant, and not mis-statements of the contents of the instrument. In the *latter case, if the plaintiff had been induced to sign under an entire ignorance of what he was doing, it might have been a fraudulent transaction. But there is no pretence for saying that, for the plaintiff accepted the joint note, which was a new security from the father, under the composition. Having accepted this benefit he cannot now repudiate the other consequences of it. Of these the principal one is to extinguish the debt, and to operate against all the parties signing, whether the other creditors executed it or not, there being no stipulation to the contrary. These representations were not properly received in evidence, inasmuch as the effect of them was to contradict or to control the written instrument.

BAYLEY, J. :

I think that there ought to be a new trial in this case. There can be no doubt, that if a creditor who signs a composition deed or agreement, and thereby induces other creditors to sign it, makes any private bargain, the effect of which is to place himself in a better situation than the other creditors, he thereby commits a fraud upon them, and that such private bargain is void. That is established by several authorities. It is unnecessary in this case to decide the question, whether a creditor who signs an agreement for a composition at the instance of a person jointly liable with the insolvent, and takes an engagement from that person that he will make up the difference between the debt due and the composition-money, can have any remedy against

the surety, because it has not been submitted to the jury in this case, whether there was such a bargain or not. The only question, therefore, is, whether the plaintiff was induced by any fraudulent representation to sign the agreement. It was represented by the agent *of the insolvent to the creditors convened for the purpose of executing the agreement of composition, that the surety would continue liable, notwithstanding the agreement of the creditor to accept, in full, five shillings in the pound, to be secured by the father. That, however, was a misrepresentation merely of the legal effect of the agreement. Now, every man is supposed to know the legal effect of an instrument which he signs; and, therefore, this must be taken to be a representation as to a fact within the knowledge of the creditor, and such misrepresentation will not have the effect of avoiding this instrument, because it was not calculated to mislead the creditor. But the agent of the insolvent also represented to the creditors, that the instrument would be void, unless all the creditors signed. There can be no doubt that an agreement for a composition ought to contain a clause to that effect, and that no man in his senses ought to sign such an instrument without it, for otherwise the object of the instrument may be defeated; but here there is not any clause in the agreement, or any memorandum attached to the signature of the plaintiff, by which he declares that he signs it upon that condition. If a party at the time when he signs an instrument annexes to his signature a condition that the deed is only to have effect against him in case all the creditors sign it, it will be void as to him, unless they do sign. But if he puts this condition on the face of the instrument, other creditors will not be induced to sign by seeing his signature, except upon the same terms which he has annexed to it, but if a creditor signs such an instrument generally, he becomes a party to it unconditionally, and then the legal effect of the instrument must be collected from the instrument itself, and not from verbal declarations made by the parties at *the time when they executed it. On the face of this instrument the plaintiff has not annexed any condition to his signature, and that being so, I think that parol evidence of such a representation was not admissible, and, consequently, we are

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not warranted in saying that the instrument was null and void *ab initio*, on the ground that all the creditors have not signed. That being so, the rule for a new trial must be made absolute.

HOLROYD, J. :

I also think there ought to be a new trial. Although this be a case where the action is brought against a surety, it must be considered in the same light, as if it was brought against the principal. If the original debt be satisfied and gone, no action will lie against the surety. The extinguishment of the debt puts an end to the agreement of the principal and surety. Now, unless the agreement for the composition can be got rid of on the ground of fraud, I think it operates as an accord and satisfaction of the original debt. The agreement imports that the creditors were to accept five shillings in the pound in full of their debts, &c. Now an acceptance of a smaller sum cannot be pleaded as a satisfaction of a larger. In point of law something further is necessary to produce that effect. But I think that when the plaintiff in this case accepted the father's note as a security for payment of the composition-money, the agreement did operate as a satisfaction and as an extinction of the debt.† It has been contended that there was evidence to shew that the defendant contracted that the debt due on the promissory note should continue against him. By the agreement for the composition, *however, it is expressly stipulated that the sum of five shillings in the pound is to be accepted in full. Any parol evidence to shew that the debt was not fully satisfied would go to contradict the agreement of the parties, and would, therefore, be inadmissible. It is not necessary, however, to decide that point. Here the father of the defendant was no party to such an engagement. He gave his note upon the faith that the agreement for composition was to be performed, and he was not privy to any agreement that the debt was to continue against the surety. To hold the surety now liable would operate as a fraud upon the father. With respect to the effect of the representations, if admissible, it may suffice to say that the plaintiff should

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† See *Steinman v. Magnus*, 11 East, 390.

have returned the note, if he intended to say that the agreement for composition was thereby rendered void.

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LITTLEDALE, J. :

I am of opinion, for the reasons already given, that this agreement was not void, on the ground that the plaintiff was induced to sign it by misrepresentation. It might be a question, whether an agreement, that the surety was to continue liable to the creditor, and that he should not afterwards have recourse to the principal debtor would be valid, notwithstanding the creditor signed an agreement to accept from the principal five shillings in the pound, in full satisfaction of the debt; but there was hardly evidence of such an agreement, and I incline to think, that if there was, it would not have been binding on the surety, for this reason, that if it were allowed to continue a debt against the surety, it would be a fraud upon the other creditors, who supposed they had contracted with each other upon *equal terms. I think it better and safer to lay down as a general rule, that any private bargain, the effect of which is to give one creditor an advantage over the others is void, the principle of composition being that all creditors shall stand on the same footing. Without, however, giving any decided opinion upon that point, I think, for the reasons already given, that the rule for a new trial must be made absolute.

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Rule absolute.†

† Generally speaking a creditor discharges a surety by giving time to or compounding with the principal debtor.

The cases upon this subject may be divided into two classes; the first, where the agreement with the principal may be considered as a fraud upon the surety, by altering his situation or increasing his risk. Such were the cases of *Nisbet v. Smith*, 2 Br. C. C. 579; *Ex parte Smith*, 3 Br. C. C. 1; *Rees v. Berrington*, 3 R. R. 3 (2 Ves. Jr. 540); *Law v. E. I. Company*, 4 Ves. 824; *Eyre v. Bartrop*, 18 R. R. 216 (3 Madd. 221).

The second, where allowing the

creditor to recover against the surety would operate as a fraud upon the principal, or any person joining with him in paying or securing the composition money, inasmuch as it would give the surety a right to proceed against the principal for that debt, from which the creditor had agreed to discharge him: *English v. Darley*, 5 R. R. 543 (2 Bos. & P. 61); *Burke's* case, there cited by Lord ELDON; *Ex parte Gifford*, 6 R. R. 53 (6 Ves. 805); *Boulbee v. Stubbs*, 11 R. R. 141 (18 Ves. 20); *Ex parte Glendinning*, Buck, 517.

It is obvious that the first ground of discharge is inapplicable where the

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agreement between the creditor and principal debtor is made with the privity and assent of the surety; and it seems that the second is inapplicable where the surety becomes a party to the transaction in such a manner as to deprive himself of any remedy over against the principal, in the event of his being called upon to pay the residue of the debt. Where a surety compels the creditor to sue, or prove under a commission of bankruptcy against the principal, he is considered as electing to stand in the situation of the creditor with respect to the remedy against the principal, and in order to do so must bring the debt into Court: *Beardmore v. Crutenden*, Co. Bank. Laws, 211; Dict. per LORD CHANCELLOR in *Wright v. Simpson*, 6 Ves. 734. Hence it may follow that if a creditor, at the request of the surety, and for his relief, agrees to accept a composition from the principal, the surety would be considered as electing to stand in the situation of the creditor, and that he could not recover over against the principal upon *being compelled to pay the residue of the debt. In *Ex parte Glendinning*, Buck, 517, the LORD CHANCELLOR is reported to have said that a creditor entering into an agreement for a composition with a debtor, and wishing to retain his remedy against a surety, must cause the reservation to appear upon the face of the agreement, for that parol evidence cannot be admitted to explain or vary the effect of the instrument. If that observation is to be construed generally, it will greatly simplify questions upon this subject; for then, wherever a creditor and principal debtor have entered into an agreement for a composition, not containing a reservation of the remedy against a surety, and an action is afterwards brought against the latter, it will be unnecessary to inquire whether he was or was not

privity and consenting to the agreement, or whether he has or has not done any thing to deprive himself of the right to recover over against the principal; he will be absolutely discharged by the agreement entered into between the creditor and the principal debtor. But the judgment in *Ex parte Glendinning* appears to be founded upon *Burke's* case, which is also cited by the LORD CHANCELLOR in *Ex parte Gifford* (6 R. R. at p. 57), 6 Ves. 809, as an authority for saying that where the remedy against the surety is reserved in the agreement for composition, a recovery against the surety cannot operate as a fraud upon the principal; for that if demand out of that recovery arises against him, it is with his own consent. Perhaps therefore the observation in *Ex parte Glendinning* was intended to apply to those cases only where, but for the reservation in the agreement, the proceeding against the surety would operate as a fraud upon the principal, and parol evidence may still be admissible to shew that the composition was made with the privity and at the request of a surety, and that he has deprived himself of any right to recover over against the principal; for such evidence would leave the written instrument (according to its import) a discharge to the principal, and would not contradict it, unless indeed it be so framed as to *extinguish* the debt.

There is another large class of cases in which it has been held that a person joining other creditors in compounding with a debtor, or signing a bankrupt's certificate, cannot lawfully stipulate for any benefit to himself beyond that which the other creditors receive; whether that benefit be given by the debtor himself or any third person for his relief: *Smith v. Bromley*, 2 Doug. 695; *Cecil v. Plaistow*, 1 Anstr. 202; *Cockshott v. Bennett*, 1 R. R. 617 (2 T. R. 763);

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(4 Barn. & Cress. 517—524; S. C. 6 Dowl. & Ry. 610; 3 L. J. K. B. 188; S. C. nom. *Ex parte Rohde*, 1 Mont. & Mac. 431.)

The drawer of a bill of exchange became bankrupt and absconded before it was due, but his house remained open, in the possession of the messenger under a commission of bankruptcy issued against him, for some time after the bill became due, and before that time the holder of the bill had notice that A. and B. were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonoured. The holder did not give notice of the dishonour to the drawer or leave it at his house, nor did he make any attempt to give such notice to the assignees of the drawer: Held, that the bill was not proveable under the commission issued against the drawer.

THIS was a feigned issue directed by the VICE-CHANCELLOR to try the question, whether, on the 10th of May, 1821, there was any debt due under and by virtue of five several bills of exchange set forth in the declaration drawn by one John Soady Rains, upon and accepted by one Joseph Lacklan, or any of them, which debt was proveable by the plaintiffs, as assignees of Sawyer, Jobler, & Co., the indorsees of the said bills, under a commission of bankrupt issued against the said J. S. Rains. At the trial before Abbott, Ch. J., a verdict was found for the plaintiffs, that there was a debt under and by virtue of the said bills of exchange, which was proveable under the commission issued against the said J. S. Rains. On a motion before the

Jackson v. Lomas, 4 T. R. 166; *Feise v. Randall*, 6 T. R. 146; *Jackman v. Mitchell*, 9 R. R. 229; 13 Ves. 581; *Leicester v. Rose*, 4 East, 372; *Wells v. Girling*, 1 Brod. & Bing. 447; *Jackson v. Davison*, 4 B. & Ald. 691. But

all those decisions related to new securities given as a consideration for signing the composition-deed or certificate, and proceeded on the ground that the advantage gained by the particular creditor was a fraud upon the others, and they do not appear applicable to securities existing before the negociation for a

composition. See *Thomas v. Courtenay*, 1 B. & Ald. 1.

Mr. Justice WILLES in his judgment in *Bateson v. Gosling* (C. P. 1871), L. R. 7 C. P. 14, 41 L. J. C. P. 56, mentions that the above note (which had been erroneously attributed to Mr. Justice HOLROYD) is by the late Mr. Justice CRESSWELL.—R. C.

† See now Bills of Exchange Act, 1882, s. 48, s. 49 (10). The case furnishes a simple illustration.—R. C.

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Lord Chancellor, on the part of the defendants for a new trial, his Lordship directed the following case for the opinion of this Court, upon the points which had been raised before the Vice-Chancellor. The five bills of exchange set forth in the declaration became due in the month of June, 1818. The drawer, J. S. Rains, left his dwelling-house on or about the 17th of April, 1818, and absconded and went abroad, and never returned again. On the 20th of April, 1818, a commission of bankrupt was issued against *J. S. Rains, under which commission the defendants were duly chosen assignees, and the bankrupt's effects were assigned to them previously to the time when the said bills of exchange became due. The bankrupt did not surrender to his commission, the time for which surrender was limited to the 23rd of June, 1818. The bankrupt's house remained open, in the possession of the messenger under the commission, for some time after the bills were due. The acceptor became bankrupt on the 23rd of April, 1818, and the bills were dishonoured when they became due, but no notice of the dishonour was given to the drawer, or left at his house. The holders of the bills had notice before the bills became due, that the defendants had been chosen assignees of the estate and effects of the said J. S. Rains, but no notice of the dishonour of the bills was given, or attempted to be given, to the defendants. The commission of bankrupt against Sawyer, Jobler, & Co. was issued on the 29th of October, 1818, and the plaintiffs are their assignees and the holders of the bills. The question for the opinion of the Court was, whether, under these circumstances, the bills were proveable under the commission issued against the drawer?

F. Pollock for the plaintiffs :

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The assignees of the holder of the bills in question are entitled to prove the amount under the commission against the drawer. The bills were running at the time when the drawer became bankrupt, he absconded long before they became due; and, therefore, as personal notice of the dishonour of the bills could not be given to him, it was unnecessary to give any notice at all. Suppose the drawer had absented *himself, but had not become bankrupt, he might have been sued on these bills,

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although notice had not been given. Neither was it necessary to give notice to his assignees. They do not for this purpose represent the person of the bankrupt, and there is no case deciding that they are entitled to notice under such circumstances. It must be admitted, that the bankruptcy of the drawee furnishes no ground for neglecting to present a bill for acceptance or payment, or for omitting to give notice of the non-acceptance or non-payment: *Russel v. Langstaffe*,† *Esdaile v. Sowerby*,‡ but that is because the bankrupt may find friends to assist him in making the payment. But it does not thence follow that the assignees of a bankrupt drawer are entitled to notice of dishonour. They are merely trustees to collect the assets of the bankrupt, and distribute them amongst the parties entitled. Any rule requiring notice to these defendants, would equally apply to the assignees under a voluntary assignment for the benefit of creditors. The reason for requiring notice of dishonour is, that the party may withdraw his funds out of the hands of the acceptor, but that reason does not apply to the assignees of a bankrupt, for they are bound as soon as possible to get in the whole of the bankrupt's property.

Tindal for the defendants :

The holders made these bills their own by negligence, either in not using due diligence to give notice to the drawer, or in neglecting to give notice to his assignees. The case does not state that the absconding of the drawer was known to the holder *of the bills ; if, therefore, judgment be given for the plaintiffs, the Court must judge by the event, whether it was necessary to give notice, and not by the conduct of the party at the time, whether he was guilty of any negligence. It is a general rule that notice must be given, and if a party is to be excused from that obligation, he must bring himself strictly within the exception. He must either give notice or use diligence in attempting to do so: *Bateman v. Joseph*,§ *Beveridge v. Burgess*,|| *Crosse v. Smith*,¶ *Goldsmith v. Bland*.†† None of those cases turned upon

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† Doug. 514.

|| 13 R. R. 798 (3 Camp. 262).

‡ 10 R. R. 440 (11 East, 114).

¶ 14 R. R. 529 (1 M. & S. 545).

§ 11 R. R. 443 (12 East, 433 ; 2 Camp. 461).

†† Bayley on Bills, 224.

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the question, whether an attempt to give notice would have been effectual, but whether the attempt was, in fact, made. In the present case, notice might have been left at the drawer's house, and that might have reached him; but no endeavour was made to find or communicate with him. In *Brett v. Levett*,† the want of notice to a bankrupt drawer was supplied by proof of an admission by him that he knew the bill would not be paid; and it was never contended that notice was unnecessary in general where a drawer had become bankrupt. Secondly, if notice to the bankrupt was unnecessary, still it should have been given to the assignees. In *Ex parte Moline*,‡ a bill having been dishonoured, and the drawer having become bankrupt, notice was given to him before assignees were chosen under the commission, and Lord Eldon held that to be sufficient, because the bankrupt represents his estate until assignees are chosen. From that case it follows, *that where a bill is dishonoured after the choice of assignees, notice should be given to them. It may be very important for the assignees to have notice in order that they may be acquainted with the real state of the bankrupt's affairs.

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(BAYLEY, J. :

They may have an interest in watching the estate of the acceptors also, ex. gr. where he becomes bankrupt with funds of the drawer in his hands, his estate might pay a large dividend before the assignees of the drawer knew that the bills would fall upon their bankrupt's estate.)

Again, the argument as to assignees under a voluntary assignment does not apply, for the assignees of a bankrupt are by statute made his representatives, and sue in their own names. Suppose the case of a drawer dying before the bill becomes due, and that the residence of his executor is known to the holder; if the bill is dishonoured, notice must be given to the executor. Now an executor, who is by proceedings in equity compelled to administer the estate equally amongst creditors, is precisely in the same situation as the assignee of a bankrupt. The plaintiffs, therefore, having neither given nor attempted to give notice of

† 13 East, 213.

‡ 19 Ves. 216.

the bills in question, have made them their own ; the absconding of the drawer not being under the circumstances of this case any excuse for the neglect.

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Pollock, in reply :

The case *Ex parte Moline* proves nothing beyond the sufficiency of the notice in that particular case. The deduction attempted to be drawn from that case is, that after the choice of assignees, notice must be given to them, and not to the bankrupt. But suppose a commission to be superseded, the notice to the assignees would be nugatory as against the bankrupt. *The assignees can only claim a right to notice on the ground of some injury to the bankrupt's estate. At all events, therefore, it is sufficient to place them in as good a situation as a person guaranteeing a bill, who cannot avail himself of the want of notice as a defence, unless he has thereby sustained an injury. It is not pretended that their bankrupt's estate has sustained any injury from the want of notice.

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Cur. adv. vult.

The judgment of the Court was now delivered by

BAYLEY, J. :

This was an issue from the Court of Chancery on the question, whether plaintiffs as assignees of Messrs. Sawyer, Jobler, & Co. had any debt proveable under the estate of John Soady Rains, a bankrupt. Their claim was upon five bills of exchange, drawn by Rains upon Joseph Lacklan, and indorsed to Sawyer & Co.; the bills became due June, 1818, and before that time Rains and Lacklan had both become bankrupts, and Rains had not surrendered to his commission. Rains committed his act of bankruptcy by leaving the kingdom on the 17th of April, 1818. A commission issued against him on the 20th, and he has never returned. Lacklan became bankrupt on the 23rd of April, 1818. When the bills became due they were dishonoured, but no notice was left at Rains's house, nor sent to his assignees; the house was open at the time, and the messenger in it, and the holder of the bills knew the defendants were Rains's assignees, and the question upon these facts was, whether the want of notice was a

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term, and after *the death of the said Nancy, to wit, on, &c., a large sum of money, to wit, 24*l.*, for one year's rent, became due to the plaintiff. Defendant cravedoyer of the indenture, whereby it appeared that the reddendo in the lease was to plaintiff and Nancy his wife, *her heirs or assigns*. And the covenant for payment of rent was with plaintiff and Nancy, *her heirs and assigns*, to pay the rent to plaintiff and Nancy his wife, *her heirs and assigns*. First plea, *non est factum*. Second, that plaintiff and Nancy his wife, before and at the time of making the indenture, were seised in their demesne as of fee, in right of the said Nancy only, of the premises in question, and that the plaintiff then had not any thing in the premises, except in right of his wife, and that the wife, after the making the indenture, and before any part of the 24*l.* in the declaration mentioned became due or payable, to wit, on, &c., at, &c., died without issue, so seised, leaving one J. A., her brother and heir-at-law. Whereupon all the estate which plaintiff had expired, and the said J. A. became seised; and being so seised, afterwards, to wit, on, &c., entered and ejected defendant. Third plea, that plaintiff never had any thing in the said demised premises, with the appurtenances, except in right of the said Nancy, whose estate the said pieces or parcels of land with the appurtenances in the declaration mentioned, were; and that the said Nancy, after the making of the said supposed indenture, and before any part of the said sum of 24*l.* became due and payable, to wit, on, &c., at, &c., died without issue, leaving J. A., her brother and heir-at-law; whereupon all the estate and interest which the said plaintiff ever had of or in the said demised premises with the appurtenances, altogether expired, ceased and determined; *nor hath he from thence hitherto had, nor has he now, any estate or interest whatever therein. And the said J. A., as such heir as aforesaid, afterwards, to wit, on, &c., at, &c., threatened him, defendant, to eject and evict him from the possession of the said demised premises with the appurtenances, unless defendant would attorn and become tenant, and defendant was then and there forced and obliged to, and did necessarily attorn and become tenant of the same, to the said J. A. Demurrer and joinder. In the Court of C. P. judgment on the demurrer was

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given for the defendant,† whereupon a writ of error was brought, and general errors assigned.

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Taunton, for the plaintiff in error :

The third plea, upon which judgment was given for the defendant in the Court below, does not contain any traversable allegation upon which a material issue could be taken ; it is, therefore, bad. Supposing the statement in the third plea to amount to an allegation that the wife had some estate, it does not follow that she had an estate of inheritance, so that her brother and heir would take it, and no traverse could have been taken upon that.

(HOLROYD, J. : It appears by inference that the wife had such an estate as determined on her death, and that is admitted by the general demurrer, although on special demurrer it might not have been sufficient.

LITLEDALE, J. : If it appears that the wife had an estate determining at her death, can the husband sue for rents accruing afterwards ?)

Yes, for he is a mere stranger ; the lessee is in by the wife, and the husband joins only for conformity : *Harvy v. Thomas*.‡ The lease, therefore, works by *estoppel, and the lessee is bound to pay the rent.

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(HOLROYD, J. : A husband seised in right of his wife has an interest in the land.§)

That is, a defeazible interest only ; and in 1 Ventr. 358, PEMBERTON, Ch. J., says, “The difference is where the party that makes the estate has a legal estate, and where a defeazible estate only ; for in the latter case, a lease may work by estoppel, though an interest passed so long as the estate (out of which the lease was derived) remained undefeated.” In *Dixon v. Harrison*,||

† 2 Bing. 112.

‡ Cro. Eliz. 216.

§ See *Blake v. Foster*, 5 R. R. 419 (8 T. R. 487).

|| Vaugh. 46.

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there is this passage: "To this purpose there is a case. If a man be seised of land *jure uxoris*, and leaseth the land for years, reserving rent, his wife dies without having had any issue by him, whereby he is no tenant by the courtesy, but his estate is determined, yet he may avow for the rent before the heir hath made his actual entry. This case is not adjudged, but it is much the better opinion of the book;" and the Year Book 9 Hen. VI. f. 43, is cited, and the same passage is cited in Bro. Abr. Avowry, pl. 123. Now that must mean rent accruing after the death of the wife; for, at common law, a distress for rent could not be made after the determination of the estate in respect of which it became due.

(LITLEDALE, J.: The covenant in the lease is to pay rent to the husband and wife and the *heirs of the wife*; that shews that the husband's interest ceased on the death of his wife, and the declaration shewing that the wife was dead when the rent became due, shews that the husband has no right of action.)

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The covenant in question might be strong evidence before a jury upon an enquiry whether the estate were the wife's, but is not sufficiently certain to determine the question on the record; *and if it be not clear that the whole estate was the wife's, then the husband is entitled to sue, as the survivor of two joint covenantees: *Anderson v. Martindale*.† The judgment of the Court below proceeded on the supposed existence of two circumstances which do not appear on the record; first, that the wife was seised in fee; secondly, that the lease was good under the 32 Hen. VIII. c. 28.‡ Now the third plea nowhere states that the wife was seised in fee; and if it did, still there is not any thing to shew that the lease would be good within the statute, for it does not appear that the lands had been accustomed letten for twenty years before the lease, nor that the accustomed rent was reserved.

E. Lawes, *contra*, was stopped by the COURT.

† 6 B. R. 334 (1 East, 497).

‡ See note, p. 380, *post*.—R. C.

ABBOTT, Ch. J. :

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I am of opinion that the judgment of the Court of Common Pleas was right. This is an action of covenant for non-payment of rent. The plaintiff, in his declaration, alleges that he and his wife *demised*. He takes upon himself to set forth the legal effect of the indenture; and, therefore, as against him, it must be taken that his wife had some interest in the premises. He then sets out the *reddendum*, and a covenant to pay the rent; but those being stated imperfectly, the defendant sets out the whole deed on oyer. In the declaration there is an averment of the death of the wife, and the conclusion of it alleges that the rent in question, after the death of the wife, became due to the plaintiff, and still is in arrear and unpaid to him. The deed, when set out on oyer, is to be considered as forming a part of the declaration, and we thereby see that the lease was *made by the husband and wife, and the *reddendum* and covenant to pay rent are in these words: "Yielding and paying, therefore, yearly and every year during the said term, unto the said J. Hill and Nancy his wife, *her heirs or assigns*, the rent or sum of 24*l.*" "And the said J. Saunders doth hereby covenant to and with J. Hill, and Nancy his wife, *her heirs and assigns*, that he the said J. Saunders will pay unto the said J. Hill and Nancy his wife, *her heirs or assigns*, the said rent." The defendant by executing this deed estopped himself from saying that no interest passed, but he may, nevertheless, aver, that it has been put an end to. Upon the face of the declaration, I should have had great difficulty in saying that the plaintiff could recover, because the lease is framed upon an intent, that on the death of the wife, the rent should be paid to her heirs. There is no covenant by the defendant to pay rent to the husband after the wife's death. But passing that by, as a point upon which it is unnecessary to give any decided opinion, the question is, whether the third plea in substance shews sufficient matter to defeat the plaintiff's action. That plea alleges, that the plaintiff never had any thing in the *demised* premises, except in right of his wife, whose estate the said parcels of land in the declaration mentioned were. I consider that as an allegation of two matters, and as it is immaterial in what order they are alleged, they may be

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transposed, and then the plea will run thus: "That the parcels of land in the declaration mentioned were the estate of Nancy the plaintiff's wife, and that he never had any thing in the premises, except in right of the said Nancy." The plea then avers, that before any part of the rent in question became due, the wife died without having had *issue, whereupon all the estate and interest which the plaintiff ever had of or in the premises, altogether expired, ceased, and determined. Surely those facts are averred with sufficient certainty to enable the plaintiff to take issue upon any of them. He might have replied, that the estate was not the wife's, or that the plaintiff had an interest beyond her life, or that his estate did not cease on her death. The plea is certainly informal, but I think, that in substance and effect it is good as a bar to the claim set out in this declaration; the judgment of the Court below must, therefore, be affirmed.

BAYLEY, J.:

The judgment in favor of the defendant may be supported, without assuming either that the wife was seised in fee, or that the lease was good by virtue of the statute 32 Hen. VIII. c. 28.† The declaration, which professes to state the legal effect of the lease, alleges that the plaintiff and his wife demised; the wife, therefore, must have had some estate, and either that would be her separate estate, or she and her husband would be joint tenants. The plea shews that there was not a joint tenancy, the estate of the husband, therefore, must have been in right of the wife only. Common sense then shews that the husband can have no right to the rent, which became due after his wife's death. If, in this case, the plaintiff could say that his interest continued after his wife's death, the same might have been done in *Blake v. Foster*,‡ but there the opinion of the Court was against such a claim. And that case, at all events, proves that the defendant was at liberty to shew that his lessor *had a limited interest, and that it had expired before any breach of covenant was committed.

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† Repealed except as to leases by persons having an estate in right of their churches, 19 & 20 Vict. c. 120,

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‡ 5 R. R. 419 (8 T. R. 487).

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I also think that the judgment of the Court of Common Pleas was right. Upon this declaration, which is not drawn with a *testatum existit*, it is alleged that the husband and wife demised. It must therefore be taken to be an indenture operating as a *demise* by the two, which it could not unless the wife had an interest, for although without such interest it might work by estoppel, yet it would not be a *demise* by her. The husband, too, had such an interest as would make it a *demise* by him. A guardian in socage may demise, and a lease by him may be so pleaded, although the term moves out of the seisin of the infant. This being the case, it appears to me that the plea contains material traversable matter, although not formally pleaded. It states that the estate of the plaintiff determined on the death of the wife, and afterwards there is an allegation of entry by the heir. Those are issuable facts, and are admitted by the demurrer. It is to be observed that the defendant is a stranger to the lessor's interest, and may therefore shew generally that it is at an end, in the same manner as a lessor may state generally that a lease by various mesne assignments is vested in an assignee, whereas the assignee must state all the assignments particularly.† But then it is said that the lease was only voidable, and that the husband was entitled to rent until the entry of the heir, and a passage from Vaughan's Reports was cited. But it seems to me that the plea discloses that which was equivalent to an entry by the *heir, for it states that the heir threatened to evict the defendant, and that he was obliged to attorn, in order to prevent it. These reasons satisfy me that the plea in question is in substance good as a bar to the action, and that the defendant is entitled to judgment on the demurrer.

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LITTLEDALE, J. :

I am of the same opinion. It appears by the lease as set out on oyer that the defendant covenanted to pay rent to the heirs of the wife after her death. The defendant pleads that the wife died before the rent sought to be recovered became due, and that the plaintiff's interest then ceased ; it also shews a claim of the

† 1 Saund. 112 a (1).

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rent by the heir, which is tantamount to an eviction by him. Unless, therefore, the plaintiff can avail himself of some technical rule of law, he cannot maintain this action; and it has been contended for him, that this being a covenant with the husband and wife, it goes to the survivor, and that the defendant is estopped by the deed. The plea furnishes a sufficient answer. It is shewn by the indenture that the wife had some interest, and the plea avers that she had the whole interest. If so, it truly avers that upon her death the interest of the husband ceased, and the defendant is not estopped from shewing that. The general demurrer admits the facts alleged in the plea, and taking them to be true, the plaintiff has no right of action.

Judgment affirmed.

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WARRE v. MILLER.

IN ERROR.

(4 Barn. & Cress. 538—547; S. C. 7 Dowl. & Ry. 1; 4 L. J. K. B. 8; S. C. at Nisi Prius, 1 Car. & P. 237.)

Assumpsit on a policy of insurance on freight of a ship at and from Grenada to London. It was proved that there is only one custom-house for the whole island of Grenada, that the vessel arrived in safety at Grenada and discharged part of her outward cargo at three different bays, and she was proceeding to a fourth to discharge the residue of her outward cargo and take in part of her homeward cargo, when she was lost by perils of the sea: Held, that the vessel at the time of the loss was proceeding to this fourth bay for a purpose connected with the voyage insured, and consequently that it was no deviation, and the underwriter was liable.

ASSUMPSIT on a policy of insurance on freight upon the ship *Aurora*, at and from Grenada to London, with leave to call at all or any of the West India Islands (Jamaica and St. Domingo excepted), warranted to sail from Grenada on or before the 1st of August, 1823, and it was agreed that it should be lawful for the said ship in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever and wheresoever, with liberty to load and unload goods wherever she might touch, without being deemed any deviation, and without prejudice to that insurance. The declaration then averred that the defendant subscribed the policy, and that the ship, to wit, on, &c., was in

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good safety at Grenada, and that divers goods and merchandizes were then and there loaded on board her, to be carried therein, on and for freight on the said voyage; and the master of the said ship had then and there entered into certain contracts and agreements with divers persons, whereby they had contracted and agreed with him to load other goods on board the said ship to be carried on freight on the said voyage; which last-mentioned goods were then and there ready to be loaded. The interest of the plaintiff and the loss of the ship by perils of the sea were then stated. Plea, the general issue. At the trial before Park, J., at the London sittings after Hilary Term, 1824, it was proved that the defendant subscribed the policy, and that the *plaintiff was owner of the ship *Aurora*. That she sailed on her outward voyage on the 10th of December, 1822, and arrived at Grenada on the 16th of January, 1823, having taken out supplies for several estates in Grenada. The ship went first to Grand Male Bay in Grenada, anchored there, and remained 48 hours, and delivered part of the supplies there; she then went to Duquesne's Bay in Grenada, and delivered another part of the outward cargo, and remained there about three days. She next proceeded to Irwin's Bay in Grenada, and arrived there about the 22nd of January, and delivered there part of the supplies for some estates in that neighbourhood. The ship quitted Irwin's Bay on the 3rd of February, and proceeded towards Grenville Bay, in Grenada, for the purpose of delivering the remaining part of the outward cargo, about one-eighth, and to take in a part of her homeward cargo, but was lost by perils of the sea while going into Grenville Bay. There is only one custom-house in Grenada for all the different bays. Before the captain sailed for Grenville Bay he had made engagements with several persons for homeward cargo, amounting to very nearly a full cargo. Upon this evidence it was contended for the defendant that there had been a deviation from the voyage insured, and the learned Judge was requested so to direct the jury; but he was of opinion that there had not been a deviation, and directed the jury to find for the plaintiff if they thought that positive contracts for homeward cargo had been made by the master. The jury found that the ship at the time of the loss was going to Grenville Bay for the double purpose of

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delivering the remaining part of her outward cargo, and to take in her homeward cargo, *and gave their verdict for the plaintiff. A bill of exceptions was thereupon tendered to the learned Judge and sealed by him, and a writ of error brought, whereupon the common errors were assigned.

Taddy, Serjt. for the plaintiff in error :

The point for the opinion of the Court is, whether the ship at the time of the loss was within the risks insured, and that depends upon two questions ; first, whether the risk had ever attached, and, secondly, whether there had been a deviation.

(ABBOTT, Ch. J. : The first point was not disputed at the trial, and the learned Judge was not requested to give any direction to the jury upon it.)

Then the defendant must now rely upon the deviation, of which the captain certainly had been guilty, unless at the time of the loss the ship was doing that which was connected with the purposes of the voyage insured only. *Solly v. Whitmore*[†] is a strong authority upon this point ; there a ship was insured at and from Hull to the port or ports of loading in the Baltic or Gulf of Finland, with liberty to touch and stay at any ports or places whatsoever for all purposes, without being deemed a deviation. Pillau was the intended port of loading, but the vessel touched at Elsinore and Dantzic to unload goods, and was afterwards lost by the perils of the sea before she arrived at Pillau ; and it was held that the liberty to touch and stay at any ports or places was confined to touching for the purposes of the voyage insured ; and, therefore, as the unloading of goods at Elsinore and Dantzic was unconnected with the purposes of that *voyage, touching at those places for that purpose was a deviation. So here the unloading of goods at Grenville Bay was quite unconnected with the purposes of the voyage insured. This policy was to protect the ship whilst preparing for her homeward voyage, and during that voyage. To be within the protection of the policy the ship must be employed on the purposes of the voyage insured only, otherwise the risk of the

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[†] 24 R. R. 274 (5 B. & Ald. 45).

underwriters may be indefinitely extended. The captain had no right to mix up together the two objects of delivering the outward and loading the homeward cargo at Grenville Bay: *Inglis v. Vaux*.† Nor can any inconvenience or hardship arise from such a decision, because the case may in future be provided for by a special liberty in the policy.

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(LITTLEDALE, J.: The case of *Inglis v. Vaux*† differs materially from this. The voyage was made of longer duration by the stay at Antigua; here the policy attached as soon as the ship was in good safety at Grenada, and the captain might remain there as long as he pleased, provided he complied with the warranty to sail before a particular day.)

The learned Judge at Nisi Prius decided this case upon the authority of *Camden v. Cowley*,‡ but that case would not, as to many particulars, be now supported. The custom of merchants was inquired into, to ascertain when the outward policy determined, and it was held that a policy at and from a foreign port commenced when the outward policy ended. In the present case it is clear that if the vessel had gone to Grenville Bay for the sole purpose of delivering the outward cargo, it would have *been a deviation, on account of the delay thereby sustained; but the delay is equally great, although in addition to that purpose the captain had the further object of taking in part of the homeward cargo. In *Motteux v. The London Assurance Company*,§ Lord HARDWICKE said, that a policy at and from a foreign port attached on the first arrival there, but in *Chitty v. Selwyn*|| that *dictum* is thus qualified: "Where a ship is insured at and from a place, and it arrives at that place, as long as the ship is preparing for the voyage upon which it is insured, the insurer is liable." Here the ship was not at the time of the loss employed in preparing for the voyage insured, the underwriter is therefore discharged.

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Campbell, contrà :

If the ship in question had been going to Grenville Bay for the

† 14 R. R. 778 (3 Camp. 437).

§ 1 Atk. 545.

‡ 1 W. Bl. 417.

|| 2 Atk. 359.

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sole purpose of delivering her outward cargo, she would have been protected by this policy; but as she was going there for the double purpose of delivering her outward and taking in her homeward cargo, *a fortiori*, she was protected. The effect of the policy was to take up the ship, as soon as she arrived in safety at the outward port, and protect her, whilst pursuing the legitimate objects of the adventure, until she arrived in Great Britain. Grenada has only one custom-house, and is, in law, all one port; therefore, going from bay to bay, for the purpose of delivering the outward cargo, was the same as going from quay to quay in one large harbour. The policy attached upon her safe arrival at the first bay. Had she proceeded to discharge the whole cargo there, and been *lost whilst that process was going on, she would clearly have been protected; and if Grenada is to be considered all one port, it can make no difference that she delivered her cargo at various places or bays in that port. *Camden v. Cowley* decided that the ship would have been protected, had the delivery of the outward cargo been the sole object of going to Grenville Bay; and there is nothing in that case which would not now be supported. The ship was there insured "at and from Jamaica to London;" she had been anchored in good safety in one port at Jamaica, and was afterwards lost in coasting the island, for which no purpose is stated, except the delivery of the outward cargo, and the underwriters were held liable. There was a policy on the ship to Jamaica, and the determination of that risk was properly looked to, in order to ascertain when, in the understanding of the parties, the ship was to be considered as at Jamaica; for as soon as she was at Jamaica, the homeward bound policy was to attach, and having attached, the Court held that it was not discharged by the subsequent coasting for the purpose of delivering the outward cargo. In *Barras v. London Assurance Company*,† also, it was held, that the outward risk determined on the first arrival. *Solly v. Whitmore* was decided on the ground that the vessel touched at Elsinore and Dantzic, for purposes wholly unconnected with the voyage insured. So in *Inglis v. Vaux* the captain remained at Antigua, not to deliver his cargo, but to dispose of

† Marsh. Ins. 266; 1 Park Ins. 64.

it, and to seek a homeward cargo, not merely to take it on board. But in this case the ship was going to Grenville Bay, to take in as well as to deliver cargo; part of the homeward *cargo was prepared there, and no delay was occasioned. At all events, there was one legitimate object of going there; it is, therefore, incumbent on the defendant to make out that actual delay was sustained by the execution of some other purpose. This may be illustrated by the cases relating to trading, under policies giving liberty to touch and stay at ports in the course of a voyage. It was formerly held that trading in any port avoided the policy; but in *Raine v. Bell*,† and several later cases,‡ it was held, that such trading did not vitiate the policy, if it could be done without delay or otherwise increasing the risk of the underwriter.

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Taddy, Serjt. in reply :

In *Raine v. Bell*, and the other cases of that description, there was a special finding that no delay had been occasioned. Here, the intention to deliver cargo at Grenville Bay raised a presumption that delay would be occasioned, and the plaintiff was bound to rebut that presumption by evidence, but failed to do so.

ABBOTT, Ch. J. :

I am of opinion that the direction given by the learned Judge to the jury was perfectly correct. The single point for our consideration is, whether there was any deviation from the voyage insured, that being at and from Grenada to London. That includes all purposes which are preparatory to the commencement of the homeward-bound voyage, according to the usual course of the trade in which the ship was engaged. It was not disputed *at the trial that the policy had attached; and, therefore, it must now be taken that, as far as time was concerned, the ship was within the policy; and the only ground for saying that she was out of its protection at the time of the loss is, that she was then employed for a purpose foreign to the

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† 9 R. R. 533 (9 East, 195).

131); *Elliott v. Wilson*, 7 Br. P. C.

‡ See *Cormack v. Gladstone*, 10 R. R. 518 (11 East, 347); *Laroche v. Oswin*, 11 R. R. 337 (12 East,

459 *Urquhart v. Bernard*, 10 R. R. 574 (1 Taunt. 450).

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voyage insured. Whether there is any port, properly so called, in Grenada, does not appear; but it is stated that there is only one custom-house for the whole island. Now, taking into consideration that ships going out to bring home produce from the West India islands usually take out supplies for several different estates, and that they deliver them and take in their homeward cargo at various places on the coast, I think that Grenada must be considered as all one place, as was properly contended in argument; and as the outward cargo must be delivered before the homeward can be taken in, that is a necessary preparation for the homeward voyage. This insurance, then, being at and from Grenada to London, it seems to me that the employment in which the ship was engaged at the time of the loss was connected with the homeward voyage, and not foreign to it, and was, consequently, a part of the risk which the underwriter had taken upon himself. For these reasons I am of opinion that the judgment of the Court below must be affirmed.

BAYLEY, J. :

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I am of opinion that the policy which is admitted to have attached was not discharged by a deviation. According to the common course of proceeding at all the West India islands, stores are taken out for *various estates, and the homeward cargo is taken in from them. The outward cargo is, therefore, usually delivered and the homeward taken in, at places on the coast, near those estates. In the present case, it appears that the ship had been at three places in Grenada to discharge part of her outward cargo, and was proceeding to a fourth with the residue of it still on board; and that is said to be a deviation. But I think that the going to Grenville Bay was necessarily connected with the voyage insured; for the vessel, when discharging cargo there, would have been in a state of preparation for the homeward voyage. *Solly v. Whitmore* was a very different case from this: there the insurance was from Hull to the port of loading, Pillau, and the going to Elsinore and Dantzic was not at all connected with the purposes of the voyage insured. *Inglis v. Vaux* is also very distinguishable. During the long stay of the captain at Antigua, he was not

occupied in delivering the outward cargo, but in attempting to dispose of it, and procure a homeward cargo. The cases of *Forbes v. Aspinall*,† and *Forbes v. Cowie*,‡ throw some light upon this question. They were upon an insurance of freight upon the ship *Chiswick*, at and from any port or ports in Hayti to Liverpool. The ship, after unloading part of the outward, and taking in a portion of the homeward cargo at one port, proceeded to another, to discharge the rest of the outward cargo; but before that was done, she was lost by the perils of the sea. The question discussed was, what amount of damages the *assured were entitled to claim from the underwriters; and it would have been a very short answer to the whole case that the policy was discharged by a deviation; but the point was never urged. In like manner I think, in the present case, it cannot be said that the going to Grenville Bay, for the double purpose of discharging and taking in cargo, was a deviation. The plaintiff is, therefore, entitled to recover, and the judgment of the Court below was right.

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HOLROYD and LITLEDALE, JJ. concurred.

Judgment affirmed.

† 12 R. R. 352 (13 East, 323). ‡ See 12 R. R. 355 (1 Camp. 520).

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FARNWORTH AND OTHERS v. THE BISHOP OF CHESTER.†

(4 Barn. & Cross. 555—574; S. C. 7 Dowl. & Ry. 56; 4 L. J. K. B. 14.)

In 1631, A. M. founded a chapel of ease, and endowed it with lands for the maintenance of a minister, and by his will directed that his son should during his life have the nomination and election of the minister, and might by will or deed set down the order or course for the nomination and election of the minister after his death; and if he should not set down any course or order, then the minister should be nominated and elected by all the householders and heads of families in the township, and the heirs male of A. M.'s body, and such other of his kindred or blood as should have any land in the township, or the greater number of them. By the instrument of consecration all tithes, fees, and emoluments whatsoever on burials, marriages, &c. were reserved to the vicar of the parish. The son not having set down any order or course: Held, that the householders and heads of families in Astley had no right to present a curate to this chapel without the consent of the vicar.

It is a general rule of law, that where a chapel of ease has been erected within the time of legal memory, the incumbent of the mother church is entitled to the nomination of the minister, unless there has been a special agreement to the contrary, to which the parson, patron, and ordinary are parties. Per ABBOTT, Ch. J.

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DECLARATION in *quare impedit*. The first count stated that Adam Mort, on the 19th May, 1630, had founded, at his own expence, a certain chapel *or house for the public worship of God, on certain land, of him the said A. Mort, situate and being in the township of Astley, in the parish of Leigh, in the county of Lancaster: and that by his will, reciting, amongst other things, that he, the said A. Mort, had built a chapel or house for the public worship and service of God, in Astley aforesaid, it being a place far remote from any church, and the inhabitants very ignorant of good things, and that it was his, the said A. Mort's, purpose, to make some provision towards the maintenance of a preaching minister in the said township of Astley, he devised and bequeathed to the trustees therein named, their heirs and assigns for ever, certain land, whereof he was seised in fee, upon trust, after his decease, to apply the profits of the land towards the maintenance of a preaching minister, &c., and upon this

† Cited as an authority by LIND-ROCHESTER (1880) 5 C. P. D. 194, LEY, J., in *McAllister v. Bishop of* 204.

further trust, that his son, T. Mort, should, during his life, have the nomination and election, and likewise power and authority of displacing and removing, as he should see cause, the said preaching minister, and likewise might, by his last will or other his deed, in his lifetime, set down the order or course for the nomination and election, displacing, and removing of the said preaching minister after his death, and that the same course and order should be from time to time for ever observed and kept; and if it should happen that he, the said T. Mort, should not set down any course or order for the same as aforesaid, then the same preaching minister should be nominated, and elected, and displaced, and removed as occasion should be, from time to time, by all the householders, or heads of families in Astley, and the heirs male of his the said A. Mort's body, and such other of his kindred or blood as should have any lands in Astley, or the greater number of them, with the advice *of some godly ministers near adjoining; and that the voice of such person as for the time being should be the heir-male of his, A. Mort's, body should be considered as equal to six of the other voices, in the election and removal of the said minister. The declaration then averred that A. Mort died seised of the land, &c., and that on the 3rd of August, 1631, the chapel was consecrated by the then Bishop of Chester to divine worship, for the use of the inhabitants of Astley, both then and thereafter; provided that all and singular the ministers, or priests, to serve from time to time in the chapel, should be first examined, licensed, and admitted by the Bishop and his successors; and that on the 1st of January, 1632, T. Mort died, without having by his will, or any deed in his lifetime, set down any course or order for the nomination and election of the minister of the chapel after his decease; whereupon the nomination and election of the minister belonged to all the householders, or heads of families, in Astley aforesaid, and the heirs male of the said A. Mort's body, and such other of A. Mort's kindred or blood as should have any lands in Astley aforesaid, or the greater number of them, with the advice of some godly ministers near adjoining the township of Astley. It was then averred that the following ministers were nominated and elected by the greater number of the householders and heads

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FARNWORTH of families in Astley, and the heir male of the body of A. Mort,
 THE BISHOP or such other of his kindred in blood as then had lands in Astley,
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 belonged, with the advice of certain godly ministers near adjoining
 the said township of Astley, and were duly licensed, examined,
 and admitted by the Bishop, viz. on the 18th of October, 1716,
 [*558] Barrett, *clerk; on the 20th of August, 1728, James Marsh,
 clerk; on the 26th February, 1731, Thomas Mawdsly, clerk;
 and that on the 11th June, 1760, the old chapel was taken down,
 and another erected in lieu thereof, and consecrated; that on
 the 23rd February, 1769, Tillotson was duly nominated and
 elected minister of the last-mentioned chapel, by the greater
 number of the then householders and heads of families in Astley,
 and the heirs male of A. Mort, and such other of his kindred or
 blood as then had lands in Astley, to whom the nomination and
 election of the same minister then belonged, with the advice of
 certain godly ministers near adjoining Astley; and that Tillotson
 was presented to the Bishop to be examined, licensed, and
 admitted; but that John Barlow, the vicar of Leigh, and divers
 land-owners and inhabitants of Astley, usurping upon the greater
 number of the householders and heads of families in Astley, and
 the heir male of A. Mort, and such other of the kindred or blood
 as then had lands in Astley, nominated and elected one R. Barker
 as minister, who was thereupon presented to and examined,
 licensed, and admitted by the Bishop; that on the 29th April,
 1822, the chapel being then vacant by the death of Barker, one
 E. Bowman was duly nominated and elected minister of the last-
 mentioned chapel by the plaintiffs, they the plaintiffs then and
 there being the greater number of the then householders and
 heads of families in Astley, to whom the nomination and election
 of the same minister then belonged, with the advice of certain
 godly ministers near adjoining the township of Astley, and which
 said E. Bowman was afterwards, to wit, on, &c. at, &c., presented
 to the defendant, the Bishop of Chester, to be examined, licensed,
 [*559] and admitted, who refused so to do. The second count *stated
 the same facts as the first count, and that the vicar refused to
 present Bowman to the Bishop, and the Bishop, after notice of
 such refusal, refused to examine or admit him, and on the

contrary licensed and admitted defendant Birkett as minister of the said chapel. The third and fourth counts were respectively similar to the first and second, except that they omitted the intermediate nominations between Barrett and Bowman. Plea by the Bishop, that the chapel was in the diocese of Chester, and that he had nothing in the said chapel except the licensing of ministers to the same chapel, and all such other things as belonged to the ordinary, as ordinary of that place. Plea by defendant, Hodgkinson, the vicar, first, that A. Mort did not declare and devise as alleged in the declaration. Second plea by Hodgkinson, that T. Mort did not die without having, by his last will and testament, or any deed in his lifetime, set down any course or order for the nomination and election of the minister of the chapel. Issue upon this traverse, and special verdict thereon. Third plea, that T. Mort, by deed-poll of the 3rd August, 1631 (not in defendant's possession, and which he therefore cannot produce) granted the chapel, and resigned and renounced his right to it to the Bishop and his successors, with a traverse that T. Mort died without having by deed, in his lifetime, set down any order. There was an issue on the traverse, and special verdict found thereon. Fourth, that Barrett, clerk, was not duly nominated and elected minister of the chapel in manner and form, &c., upon which plea issue was joined. Fifth, that James Marsh, clerk, was not duly nominated and elected, &c., upon which issue was joined. Sixth, that T. Mawdsly, clerk, was not duly nominated and elected, &c., upon *which issue was joined. Seventh, that upon the death of Mawdsly, John Barlow, then being vicar of Leigh, did duly nominate and appoint Robert Barker, with a traverse that Barlow usurped. Issue upon this traverse, and a special verdict found thereon. Eighth, that T. Mort, by deed-poll of the 3rd August, 1631, gave and granted the chapel to the Bishop, and resigned and renounced his right therein; and that defendant, Hodgkinson, being vicar of the parish of Leigh at the time of the vacancy by Barker's death, nominated and appointed defendant, Birkett, as minister. Demurrer and joinder. Ninth plea, the same as the eighth, with the omission of stating T. Mort's deed-poll. Demurrer and joinder. Pleas by the defendant, Birkett, the

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FARNWORTH same as those by the vicar. Judgment against the Bishop, with
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At the trial before the Court of Common Pleas at Lancaster, the jury found that Adam Mort did devise, as in the declaration was alleged; that Barrett, Marsh, and Mawdsly, were duly nominated and elected ministers of the chapel as in the declaration alleged; that Thomas Mort, the son of Adam Mort, did after the death of his father make a deed-poll on the 3rd of August, 1631, which recited the building and endowing of the chapel by his father, and that he delivered it up to the Bishop to be consecrated, and renounced† all title to the same. It was then found that the chapel was duly consecrated in 1631, and that it was taken down in 1760, and that a larger one was rebuilt on the site, and consecrated on the 11th of June, 1760. The special verdict *then set out the deed of consecration upon that occasion, which after various recitals stated that the Bishop did consecrate, and did grant full power and authority to the ministers licensed to officiate in the chapel, to celebrate divine service therein, to read the public prayers, to expound the Holy Scriptures, preach the word of God, and to administer the holy sacrament, solemnize matrimony, church women, and do and perform all other divine offices which lawfully might be done in other chapels, according to the rites and usages of the Church of England. It then stated, that the chapel yard was consecrated as a cemetery. But that all this was to be “without any prejudice to the mother church of Leigh, and the right and interest thereof, in all privileges, profits, tithes, oblations, obventions, fees, dues, wages, and ecclesiastical emoluments, whatsoever, to the vicar, and other minister of the same, for the time being, by law or custom in any wise of right belonging, and also the ordinary right of us and our successors, and the dignity, honor, and jurisdiction of our cathedral church at Chester, always saved and reserved.” The special verdict then stated that T. Mort did not, by his will, or any deed, except by the deed-poll, set down any course or

† During the argument the Court intimated a clear opinion that the effect of the deed was to vest the chapel in the Bishop for the purpose of consecration only; and that

Thomas Mort did not thereby set down any course or order of nomination, and that the right of nomination was not affected by it.

order for the nomination of the minister of the chapel; that on the 23rd of February, 1769, the ministry became vacant by the death of Mawdsley; that one J. Barlow, the vicar, with T. Froggott, and 64 other land-owners, nominated R. Barker, with certificate, thereof to the Bishop, and that he was by the Bishop examined, licensed, and admitted, but whether T. Mort died without setting down the order for the election, or whether Barlow the vicar usurped, the jurors were ignorant. The Court of Common Pleas at Lancaster gave *judgment for the defendants, Hodgkinson and Burkitt, on their eighth and ninth pleas, but pronounced no judgment upon the special verdict. The record being removed by a writ of error into this Court, the case was now argued by

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Scarlett, for the plaintiffs in error :

There are two questions in this case. First, whether it sufficiently appears on the face of the declaration that the right of nomination belonged to the plaintiffs; and, secondly, if it does, whether, upon the facts found in this special verdict, the right of nomination belonged to the householders and heads of families in the parish or to the vicar. As to the first, it is alleged in the declaration that Bowman was duly elected by the plaintiffs, being the greater number of the householders and head of families in Astley, to whom the nomination and election of the minister then belonged. The objection is, that it is not stated that the heir male of Adam Mort, and his nearest kindred holding lands in Astley concurred, or took any part in the election. But inasmuch as part of the allegation is, that the right of nomination *then* belonged to the plaintiffs, it must be presumed, after verdict, that the plaintiffs proved facts sufficient to shew the right to have belonged to them, at that time; which they might do by proving either, that the heir and kindred of Adam Mort concurred in the election, or were in the minority, or that there were no such persons. It is not necessary in *quare impedit* for the plaintiffs to shew a title to the advowson, they are only bound to make out a right to present. In a writ of right of advowson, it would be necessary to shew on the face of the pleadings, that the right to the advowson was actually vested in the plaintiffs; and, therefore, if this had been such

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son to be in the plaintiffs, and the heir male of A. Mort and his
next of kin.

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(BAYLEY, J. : If the allegation had been that the right belonged to A. B. and C., and that A. had presented, to whom the nomination at that time belonged, would that have been sufficient, without shewing that B. and C. were dead ?)

It would have been sufficient after verdict, although it would have been more satisfactory if it had been specifically alleged that B. and C. were dead. But there is no issue raised in this case on the fact that the right of nomination *then* belonged to the plaintiffs, and that being so, it must be presumed, after verdict, that such facts were proved as shewed that the right did belong to them.

The principal point in this case is, whether the right of nomination belongs to the parishioners, or to the vicar of Leigh. The origin of advowsons is thus given in Co. Litt. 119 b : "Advowsons, so called because the right of presenting to the church was first gained by such as were founders, benefactors, or maintainers of the church, viz., *ratione fundationis*, as where the ancestor was founder of the church ; or *ratione donationis*, where he endowed the church ; or *ratione fundi*, as where he gave the soil whereupon the church was built." Now if that be the principle upon which the right to advowsons is founded, the same principle must apply to parochial chapels and chapels of ease,† provided the rights of the mother church are not interfered with. If the founder of such a chapel were to insist that a portion of the tithes, or the fees, should be given to the chaplain, the rights of the rector or vicar would be invaded, and that could only be done with his consent ; and to make that binding on his successors,

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*there must be a compensation to the rector or vicar. Now it appears, from the record, that the parish of Leigh being extensive, A. Mort built and endowed the chapel from pious motives, and that he did not seek to invade the rights of the vicar, and that all his emoluments were reserved to him by the deed of

† See 1 Burn Eccl. Law. tit. Chapel.

consecration. Inasmuch, therefore, as the rights of the vicar are not invaded, the right of presentation, according to the authority of Lord Coke, must belong to the person who founded and endowed the chapel, or to his appointees. If any of the temporal rights of the vicar had been invaded, it would then have been necessary to have shewn not only that he had consented to the right of nomination remaining in the founder, but that he had received an adequate compensation.

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(BAYLEY, J. : Would not such a right interfere with the spiritual obligations of the vicar? He has the cure of souls in the parish, and is it not his duty to take care that any person preaching in the parish should preach proper doctrine?)

The Bishop will take care not to license any person likely to preach doctrines contrary to those of the established church. It appears from the record that it was not in the power of the vicar to extend his spiritual labours over the whole parish; and the question is, whether he might not purchase assistance by consenting to an endowment, and giving to the person endowing the right of nomination of the minister. There are three cases only which bear upon this subject; the first is that of *The Attorney-General v. Brereton*,† and the question there was, whether the right of nomination of the curate to a chapel was in the vicar of the parish or the Bishop, and it was held to be in the vicar. But there was no claim in that case by any person who had *founded and endowed the chapel, and, therefore, it is not an authority in point. The next case is *Herbert v. The Dean and Chapter of Westminster*.‡ In the plague which happened in 1625, the church-yard of Saint Margaret's, Westminster, not being large enough to bury the dead parishioners, the inhabitants of that part of the parish which then resorted to the new chapel built there, petitioned the Dean and Chapter of Westminster (who were lords of the manor) to grant them a waste piece of ground to bury their dead, which, accordingly, the Dean and Chapter did, under their seals, and it was solemnly consecrated. Afterwards these inhabitants were at the charge

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† 2 Ves. Sen. 424.

‡ 1 P. Wms. 773.

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of building a chapel there, having first obtained a royal licence for that purpose. The vestry-men and chapel-wardens had, ever since the year 1658, elected the ministers who were to preach there ; but the Dean and Chapter of Westminster claimed a right to name the minister who should preach and do divine service in this chapel. It does not appear that the persons who originally contributed to the expense of building the chapel, and the Dean and Chapter who granted the soil upon which the chapel was built, concurred in making any appointment, and they were the persons to whom the right of presentation would belong, according to the doctrine of Lord Coke. The LORD CHANCELLOR, in his judgment, expressly observes, that the Dean and Chapter had not reserved any power to nominate the preacher, and that the inhabitants of the chapelry were the persons who endowed it. He then recognizes the doctrine laid down by Lord Coke, that the building and endowing of the church was what, at common law, entitled the patron to the patronage. *And he afterwards says, "Suppose I build a chapel in my house for myself, the parson is not bound to provide for it; or I build a chapel in my house for myself or my next neighbour, can the parson name one to preach there? I think not, and it will make no alteration if the chapel which I build in my own ground be intended for the use of twenty neighbours, besides my own family." All the reasoning of the LORD CHANCELLOR is in favour of the right claimed by the present plaintiffs. It is true that the Court afterwards determined that the right of nomination did belong to the Dean and Chapter, although no reasons were given for the judgment. But in that case the Dean and Chapter of Westminster were the real patrons of the chapel, for they gave the land upon which it was built: but they being a body who could not alienate as a private person might, the right to the land and the building on it still continued in them. The next case is *Dixon v. Kershaw*,† and it will be relied upon by the other side. It appeared in that case that the lord and freeholders of the manor had granted a part of the waste to secure an annuity of 27*l.* for the use of a minister to officiate in the chapel of Almley;

† Ambler, 528; S. C. by name of *Dixon v. Metculfe*, 2 Eden's Rep. 360.

and by another deed the lord and lady of the manor, and other freeholders, granted to trustees the land whereon the chapel was built. It was afterwards consecrated, and in the instrument of consecration the Archbishop took upon himself to grant the nomination of a minister to officiate there to the inhabitants of Almley and Wortley; and the vicar of Leeds was present at the consecration, and declared that he had no right to nominate a curate to the chapel. The inhabitants of Almley and Wortley had, from the time of *consecration, in 1754 to 1761, elected the minister to officiate there. The chapel then becoming vacant, the inhabitants elected the plaintiff, and the vicar nominated Metcalf; and in that case Lord NORTHINGTON held the right of nomination to be in the vicar. But there the donors of the land did not either claim for themselves, nor had they given to any other person, the right of patronage; and that being so, it must, as a matter of course, have belonged to the rector or vicar of the parish. It is quite clear, that the inhabitants not being the nominees of the founder or endower of the chapel, had no right to present, and they could derive no such right under the deed of consecration, because the Archbishop had no power to give such right. But in this case the chapel was built with the consent of the ordinary and incumbent. It was founded and endowed by a private individual, and there being no invasion of the temporal rights of the vicar, the founder, or his appointees, are the patrons of the chapel.

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Tindal, contra, was stopped by the COURT.

ABBOTT, Ch. J. :

I am very clearly of opinion, that the want of an allegation in this declaration, that this nomination was made at a meeting, at which the heir and kindred of Adam Mort were present, (no reason being assigned for their absence,) is of itself a sufficient objection to the plaintiff's right to recover, and that upon that ground alone, if there were no other, the judgment of the Court below ought to be affirmed. But as the affirming of the judgment upon that ground alone might still leave open a door to future litigation and expense, and as it is very desirable that

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such a result should be avoided in a case of this sort, wherein dispute and litigation are most *injurious in their consequences, by creating dissensions between the clergyman and his parishioners, I thought it best to hear the argument in support of the right of any person claiming under Adam Mort or Thomas Mort, to officiate in this chapel without the consent of the clergyman. I have always understood it to be a general rule of law, that no person can be authorized to preach publicly within a chapel to which all the inhabitants of the district may have a right to resort, without the consent of the clergyman to whom the cure of souls is given. I do not speak of a chapel belonging to a private individual, where service is performed for the convenience of his family and friends, but of a chapel open to all the inhabitants of a certain district. Where there has been an endowment of a chapel beyond the time of legal memory, and the nomination has gone in a particular course, we must presume that course to have been according to the will and pleasure of the founder, and we must presume in a case of prescription every thing necessary to give effect to that which has for so long a period been done. In such a case, therefore, we must presume a consent, not only of the rector or vicar, which can be obligatory upon them, but of the patron and the ordinary. In *Dixon v. Kershaw*, Lord NORTHINGTON says, that a mere arbitrary agreement, made even with the consent of the parson, patron, and ordinary, without a compensation to the incumbent of the mother church, will not be sufficient. Perhaps that expression requires some qualification, and where nothing is taken from the income of the incumbent, the consent of the parson, patron, and ordinary, without a compensation, may be sufficient. But still the doctrine, which appears to have been the foundation of the decision, is distinctly this: that it is undoubtedly *law, that wherever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, to which parson, patron, and ordinary must be parties. There being in this case no special agreement to which parson, patron, and ordinary, were parties, it appears to me that no person can have a right to compel the vicar of the parish to allow another, although

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licensed by the Bishop, to officiate in a public chapel, erected for the ease of the inhabitants of a portion of the parish; and that no such person can officiate without the consent of the vicar. We are not called upon in this case to decide, that the vicar has a right to nominate. It is sufficient for our judgment to say, that these persons cannot have the right without the consent of the vicar, and his consent, it appears by this record, they certainly had not. It is unnecessary to advert to the other cases, with reference to which I would only remark, that the case in *Peere Williams*, though appearing, perhaps, to be contrary, if the facts could be ascertained, would not probably be found to be so, for I think Dr. Broderick was the vicar at the time, and he assented to the claim of the Dean and Chapter. But without relying upon that distinction, *Dixon v. Kershaw* being the last case, and the law being there laid down distinctly by the LORD CHANCELLOR, in a manner consistent with what I have understood to be the right of the vicar, that you shall not enable any person to preach in his parish without his consent, unless under special circumstances, which do not exist in the present case, I am of opinion that the plaintiffs have not shewn a right to present, and that the judgment given in the Court below must be affirmed.

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BAYLEY, J.:

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My opinion in this case is founded on the principle that the endowment of this chapel in the manner in which it was endowed, and the mere consecration by the Bishop, without the concurrence of the then incumbent and the patron of the living of the parish, did not give to the inhabitants and the other persons named by the founder, such an interest in this chapel, as entitled them to present a person to hold the chapel for his own life, and to bring a *quare impedit* in respect of it. I am not aware that there has been any instance where a *quare impedit* has been brought on a presentation to a chapel of this description. I know it has been done in the case of a chapel erected by the King's licence. But my opinion is founded upon this general position, that you have no right without the concurrence of the patron and incumbent, to interfere either with the

FARNWORTH ^{v.} THE BISHOP OF CHESTER. temporal rights or spiritual obligations of the vicar. It has been conceded, that if you were to interfere with the temporal rights of the vicar, the claim of a right of nomination as resulting from the endowment could not be supported; but it was argued, that its interference with the spiritual obligations of the vicar did not stand upon the same footing. It appears to me, that if the vicar has the cure of souls co-extensive with the whole limits of his parish, that casts a very serious and important duty upon him, and he has a right and is bound as the *conservator parochie* to take care that no person shall deliver doctrine in that parish, except under his sanction and authority.

[*571] It is said, that the Bishop will never appoint an unfit person, but if the vicar has the cure of souls in the parish, he has a right to act on his own judgment, and is not bound to trust to the judgment of the ordinary. Whether the vicar is bound to put in a person who is to hold *it for life, may be another very important and material question. Although the chapel is endowed, the vicar may be entitled to put in a person, not for the period of his life, for age and infirmities might render him unable to discharge the duties of such a station. The vicar may be at liberty to put a person into possession of that place to remain there so long only as his doctrine and his conduct should be agreeable to the judgment of the vicar, and so long as the vicar should find he was competent to discharge the duties of the office. Allowing the *quare impedit* to be brought in the names of those persons to whom the founder has given the right of nomination or presentation, (if the founder could give any such right,) entirely supersedes all judgment of the vicar in that respect, and ties down him and his successors during the whole period of the life of the person who may have been originally nominated. It seems to me, that looking to the spiritual obligations of the vicar in his parish, no person can have a right to force upon him in a chapel in that place, any particular individual; I think by law, that cannot be done. If we had been fettered by authorities to the contrary, we must of course have acted on those authorities. In the case of *Herbert v. The Dean and Chapter of Westminster*, the question was, in whom the right

of nomination was to be, but whether that nomination was to be for the whole life of the nominee does not appear. The result of a decision in this case in favor of the plaintiffs would be this, that wherever a person now should think fit to build a chapel upon his own land, and make and endow it as a chapel of ease, and prevail upon the Bishop to consecrate it, that would afterwards be binding upon the vicar or the rector of the parish in which that chapel was erected, and secure to the founder, and the heir of the founder, if *he reserved it to himself by the deed of endowment, the right to put in such person as he might from time to time think fit. I am of opinion, that the general rights of the vicar are inconsistent with such a notion. The case of *Dixon v. Kershaw* is distinguishable from this, because there the person who claimed the appointment founded the claim, not on the gift of the founder, but on the gift of the Archbishop. But Lord NORTHINGTON did not decide that case merely on the want of title in the inhabitants; he puts it upon three grounds; first, on the want of legal title in the clergyman, presented by the inhabitants; secondly, on the want of equity; thirdly, on the usurpation on the rights of the vicar. I think the effect of this *quare impedit* would be to intrench upon the rights of the vicar in a way in which they ought not to be affected. Upon that ground, I am of opinion that the judgment should be affirmed. We have no occasion to decide in this case, whether the vicar has the right to present, or whether he is bound to nominate for life, because there is no prayer of a writ to the Bishop in the defendant's plea; and it becomes no part of the judgment, that a writ to the Bishop to admit the defendant's clerk should issue.

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HOLROYD, J. :

Without considering, whether in this case a writ of *quare impedit* is the proper remedy,† I think the present action cannot

† See *Rex v. Marquis of Stafford*, 3 T. R. 646, and *Rex v. Bishop of Chester*, cited in argument in 1 R. R. 238 (1 T. R. 398). But the plaintiffs must shew a seisin in themselves, or those under whom they claim, Comyn, Dig. Pleader, 3; I, 4.

Quære, if householders not being a body corporate are capable of having such a seisin, for they cannot take by succession. See *Russell v. The Men of Devon*, 1 R. R. 585 (2 T. R. 667).

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be supported for the reasons already stated by my LORD CHIEF JUSTICE, and my brother BAYLEY. It is perfectly clear with respect to the first point, that the mere allegation, that the right *belonged to the plaintiffs at the time when they made this nomination is not sufficient. The parties must shew the facts, and particular circumstances out of which the right which they allege to exist in the persons making the nomination arises; they must state the facts from which it shall appear, whether they have or have not that right. It is clear from the statement in the declaration, (if taken by itself, and without the aid of some further facts), that the right did not exist in the persons making the nomination; it at least appears to have been in others as well as themselves, unless some circumstances existed, which are not stated, to shew that the right was duly exercised by the persons who made the nomination. That of itself is a complete answer to the present action. But I think further, that the right of nomination to this, as a public chapel, was not in the persons making the nomination, even supposing that the heirs male of Adam Mort were to be considered as bearing a part in that nomination, so as to obviate the formal objection. This is very different from the case of a nobleman's chapel, or the chapel of a person building it on his own property, and in respect of which public rights have not been superinduced. The consecration of this for the use of a particular township of this parish gives the inhabitants of the township a right to resort to it as a chapel, and when a minister is appointed, it gives him a right of continuing, which is very different from the case of a private chapel, where a person is appointed by the owner of the chapel to perform divine service. By that appointment he would gain no freehold interest, and might be displaced whenever the party who appointed him should think fit. In such a case, the appointment would give the minister permission to enter, but would not give him a right to continue to do so. This is very different, *being the case of a chapel consecrated for the use of a parish, or a portion of a parish; and upon the authority of the decided cases, I think that we must hold that, independently of the formal objection, the present *quare impedit* cannot be maintained,

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even supposing that one would lie for a chapel of this description. FARNWORTH
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LITTLEDALE, J., having been counsel in the case while at the Bar, gave no opinion.

Judgment affirmed.

HARPER v. CHARLESWORTH.

1825

(4 Barn. & Cress. 574—596; S. C. 6 Dowl. & Ry. 572; 3 L. J. K. B. 265.)

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A. paid a nominal rent to the King for 1,000 acres of woodland, the wood being all reserved to the Crown. During four months in the year, A. exercised the privilege of shooting over the land, and by his permission another person took the grass: Held, that the payment of the rent, the exercise of the privilege of shooting, and the taking of the grass was sufficient evidence to shew that A. was in the actual possession† of the land, so as to entitle him to maintain trespass.

A. occupied under a parol licence from the Crown, and the rent paid by him was much less than one third of the annual value of the land: Held, that as A. had no legal conveyance from the Crown by matter of record, and as the rent reserved was not one third of the annual value of the land, as required by the 1st Anne, st. 1, c. 7, s. 5, he had no legal right to retain possession of the land as against the Crown, but that as he occupied with the permission of the Crown, his possession was sufficient to enable him to maintain trespass against a wrong-doer.

Seemle, that a person who occupies Crown land under a parol licence is not an intruder.

A public footway over Crown land was extinguished by an Inclosure Act, but for 20 years after the inclosure took place the public continued to use the way: Held, by BAYLEY, J., that this user was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the Crown.

TRESPASS for breaking and entering the plaintiff's close called The Banks, and a certain other close called Allotment No. 15, situate in the parish of Hanbury, in the county of Stafford, and with feet in walking treading down the grass and herbage of the plaintiff, and breaking down part of the hedges and fences of the said closes of the plaintiff, there standing and being. *Plea first, not guilty; second, a public right of footway. At the trial before Garrow, B., at the last Spring Assizes for the county of Stafford, the following appeared to be the facts of the case: The close where the trespass was committed was part of an allotment

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† Cp. *Lord Advocate v. Lord* *Lord Advocate v. Young* (1837) 12 *Blantyre* (1879) 4 App. Ca. 770, 791; App. Ca. 544, 553.

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made to his Majesty, by the award of the commissioners under an Act of Parliament passed in 1801, for dividing, allotting, and enclosing the forest or chase of Needwood, in the county of Stafford. The Act recited that the King was seised to himself, his heirs, and successors, of the forest or chase of Needwood, containing about 9,400 acres, lying within the honor or lordship of Tutbury, parcel of the estates and possessions of the Duchy of Lancaster, in the county of Stafford, subject to common of pasturage, and other rights therein mentioned ; and the commissioners were thereby empowered to set out such public bridle roads and footways, and private roads and ways, in, over, and upon the said forest or chase, as they should think requisite. It then enacted, that after the several public or private roads should have been set out and made, it should not be lawful for any person, either on foot or with horses, cattle, or carriages, to use any other roads or ways, either public or private, over or upon the ancient or new inclosures, or the forest or chase, than such as should have been made and set out by the commissioners ; which said several roads so to be set out respectively should be set forth in the award of the commissioners, and the same should be final and conclusive upon all persons whomsoever ; and that all former roads and ways which should not be set out and appointed as roads and ways through or over the said forest or chase, should be deemed part thereof, and be divided and allotted accordingly. By another clause, *his Majesty, his heirs, and successors were enabled to make and grant leases, under the seal of the Duchy of Lancaster, for any term or number of years, not exceeding 99 years, and so as such leases be in all other respects made and granted agreeable and conformable to the terms and conditions prescribed and directed by the statute 1 Ann. statute 1. c. 7. It was proved that the plaintiff had, ever since the year 1817, paid to his Majesty, for the woodlands of his allotment of Needwood, (the timber being reserved to the King,) a nominal rent of 1*l.* per annum, which was not one third of the annual value. These woodlands comprised about 1,000 acres, and included the close where the trespass was committed. It appeared that the game-keeper, the deputy axe-bearer, and the woodward, who had the care of the woods and timber, were paid

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by the Crown, and the fences were repaired at the expence of the Crown. The plaintiff, who resided principally in London, usually came to Needwood about August, and remained there until November, and during that interval, he and his friends went over the whole of the allotment, including the close in question, for the purpose of shooting game. One Wallace, the woodward, took the grass in the glades by the plaintiff's permission. The award of the commissioners was executed in 1805, and no footpath across the close in question was set out in that award. Before the Inclosure Act there were paths in all directions, and, among others, one over the close where the trespass was committed. In 1806 the whole allotment was fenced all round, and no road or path was left over the close in question, and about fifteen years ago, a notice was affixed at the end of the path, stating that there was no road, and that all persons trespassing would *be prosecuted according to law. The trespass was admitted. It was objected by the defendant that the plaintiff had not proved that he had any lawful possession of the land where the trespass was committed, because he had not any grant under the seal of the Duchy of Lancaster, or, assuming that there might be a parol demise of land by the Crown, yet the stat. 1 Ann. stat. 1, c. 7, s. 5, had not been complied with, because the rent reserved was not one third of the annual value of the land. The learned Judge was of opinion, that the plaintiff had sufficient possession to maintain trespass against a wrongdoer, but he reserved leave to the defendant's counsel to move to enter a nonsuit. Evidence was offered on the part of the defendant to shew that a footway over the close in question was actually set out by the surveyor, who made the allotments under the Inclosure Act. The learned Judge was of opinion, that the award of the commissioners was conclusive upon that point, and refused to receive the evidence. The defendant then gave evidence to shew that ever since the time of making the award the footway had been generally used by the public, and it was contended that this proved a dedication of the way to the public. The learned Judge told the jury to find for the defendant, if they were of opinion that the user of the way, since the making of the award, had been with the assent of his Majesty, who was

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the owner of the soil, otherwise for the plaintiff. The jury having found for the plaintiff, a rule *nisi* for a nonsuit or a new trial was obtained, in last Easter Term, upon two grounds ; first, that the plaintiff had not a rightful possession of the land where the trespass was committed, but was a mere intruder on the possession of the Crown, and, therefore, could not maintain trespass ; and, secondly, *that there was sufficient evidence to shew a dedication of the way to the public, and, therefore, that the jury ought to have found for the defendant.

[After argument:]

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BAYLEY, J. :

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The first question in this case is, whether the plaintiff had any actual possession of the land where the trespass was committed ? That does not appear to have been a matter of dispute at the trial, and certainly was not the ground upon which the motion for a new trial was obtained. It appears to me that there was strong evidence to shew that there was actual possession in the plaintiff. The property belonged and the timber was reserved to the King ; but every description *of enjoyment was not exercised by the King, or by any person claiming under him. The plaintiff paid a nominal rent of twenty shillings a year, and that rent must have been paid for something ; and it must have been accepted upon the principle that, even if there was not a proper species of conveyance so as to give the plaintiff a right as against the Crown, he was entitled to have something. Now what was the land capable of yielding ? It was woodland, with rides on it, and there was a considerable quantity of game on it ; and, therefore, it afforded to any person going there an opportunity of killing game. The plaintiff himself did not appear to have any other enjoyment of the land than that of shooting the game ; he usually came about August and remained till November. Wallace had the grass, and he took it by licence, not from the Crown, but from the plaintiff, and that licence did not vest the possession in Wallace, but a privilege only which the plaintiff had conferred upon him. When, therefore, Wallace took the grass, he took it as the representative of the plaintiff, and that was a pernancy of the profits by the plaintiff. If the learned Judge had been

desired to put the question to the jury, whether there was or was not an actual possession in the plaintiff, he could not with propriety have directed them to come to the conclusion that there was not an actual possession.

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It is insisted, however, in this case, that although the plaintiff may have had the actual possession, yet the land being Crown land, and there not being any grant by matter of record, and the rent paid being less than one third of the annual value, as required by the statute 1 Anne, stat. 1, c. 7, s. 5, the possession was not such as to enable him to maintain trespass against a *wrong doer. I think that as there was no such grant, as the stat. 1 Anne, and the Needwood Forest Act require, the plaintiff had no legal title against the Crown, and the Crown might at any time, without notice, have removed him from that possession and occupation. Then it becomes a question, whether a person having the actual possession of Crown land can maintain trespass against a mere wrong doer? Generally speaking, actual possession is sufficient to entitle a party to maintain trespass against a wrong doer. That is established by a great variety of cases. *Chambers v. Donaldson* and others† is a very strong authority upon this point. That was trespass for breaking and entering the plaintiff's dwelling-house, the defendants pleaded, that the dwelling-house was the soil and freehold of A. B., and that they, as his servants, and by his command, broke and entered the same. The plaintiff, in his replication, said that they did not do it by the command of A. B., and there was a demurrer to that replication, on the ground that the plaintiff having, by his replication, admitted the soil and freehold to be in another, had thereby admitted that he had no cause of action, and that the fact whether the defendant entered by the command of the other or not, was immaterial and not traversable. The Court decided that although upon the pleadings it must be taken, that the plaintiff had a wrongful possession, as against the person in whom the freehold was, yet that such a possession was rightful, and sufficient to enable the plaintiff to maintain trespass, against a wrong doer, and that unless the defendants acted under the authority of the person in whom

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† 10 R. R. 435 (11 East, 65).

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*the soil and freehold was alleged to be, they could not justify committing a trespass against any person in the actual possession of the land. But a distinction has been taken between land belonging to a common person, and land belonging to the Crown; and if that distinction be valid in point of law, the defendant must have the benefit of it in this action. That distinction is founded on the authority of a case very loosely reported, in 4 Leonard, 184, and Godbolt, 183. ANDERSON, Ch. J. says, "If one intrude upon the possession of the King, and another man entereth upon him, he shall not have any action of trespass for that entry; for that he who is to have and maintain trespass, ought to have a possession. But in such case he hath not a possession, for every intruder shall answer to the King for his whole time, and every intrusion supposeth the possession to be in the King." Now the words "another man entereth upon him," I apprehend to mean, that another intruded, and ousted the person originally in possession. In that case the right of possession would remain in the Crown. Suppose, for instance, A. being an intruder enters, and B. afterwards intrudes, and excludes A. A. brings trespass against B. A. cannot maintain this action, because during the whole of the time the possession was not legally and properly in A. or B., but the right of possession, during the whole time, was in the Crown. The Crown would have a right to call upon A. for the profits for that time during which he had been in possession, and on B. for the same, during the time he had been in possession; and, therefore, A. cannot call upon B. for any part of those profits. The report goes on to say that PERIAM doubted, and RHODES, J. *said and vouched, 19 Edw. IV. 2 Pl. 5, to be, that he cannot in such case say, in an action of trespass, *quare clausum suum fregit*. The case from 19 Edw. IV., referred to by RHODES, J., when examined, explains the meaning of the language in Leonard and Godbolt, "That every intruder shall answer to the King for his whole time." It was trespass for breaking and entering the plaintiff's close, taking his grass, and cutting his trees. It was, therefore, an action brought against the defendant for taking the profits of the land. The defendant pleaded, that before the day of the trespass a commission issued from the Exchequer, directed

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to the escheator of the county of Suffolk, to enquire of all manner of lands and tenements, &c.; and before the escheator in the same county it was found that one John B. held the same land of the King, &c., and died without heir, wherefore the King entered, &c. Judgment, &c. *Varisor*:† “This is no plea, for notwithstanding that the King has cause to have all manner of issues and profits issuing out of, &c., yet this shall not excuse him who did the trespass; as, in like case, if a stranger take certain goods (which I have) out of my possession, and he whose property they are release to the stranger, still I shall have an action of trespass against him for the taking, &c., and yet he shall have the goods.” *Townsend*: “The contrary appears to me, for I apprehend when the King is entitled to have any land, he shall be answered for the issues and profits from the first day of his title to the day of office found, and that every man shall answer for his time, namely, each of those who occupied for the time of his occupation. *Then, if he who shall have the administration and occupation of such lands shall have no action, in this case it shall be that he account for the issues (arising during his occupation), and yet the defendant have them, which would be unreasonable.” *Choke*:‡ “For such things as arise from the land, the action by this office found is clearly gone; but for such things as do not arise from the land, as for entering the land and breaking the hedges, or for the taking of any chattel, in this case the action is not gone by the office and seizure for the King; but where the action is brought for things which arise from the land, as for cutting grass and the like, there, when the office is found for the King, all actions are gone for ever, for he shall not answer for those matters; but this person shall answer for the time; wherefore, &c.” The decision then in that case was, that trespass was not maintainable by one intruder against the other to recover the profits of the land, because each of them was liable to account to the Crown for all profits arising during the period of his occupation, but that the action was maintainable by the first intruder

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† *Varisor* and *Townsend* were made Sergeants in 18 Edw. IV.

this time a Judge of C. B., Brian being Chief Justice. See Bro. Abr.

‡ It appears that *Choke* was at Trespass, pl. 347, 358, 359.

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against the second to recover a compensation for an injury to the possession, not in any way affecting the profits of the land. That case, therefore, does not warrant the position for which it was stated by RHODES, J. It had been found by office that the lands belonged to the King, and all the profits belonged to the King from the death of his tenant. The plaintiff, therefore, not only had a wrongful possession, but the King, by entering, shewed that he meant to treat the possession as wrongful. The *plaintiff could have no right to recover the profits of the land, but the King would be entitled to them. But still it was held that, notwithstanding he had a wrongful possession as against the King, he might maintain trespass against a wrong doer. There is a subsequent case of *Johnson v. Barrett*,† which is at variance with the doctrine laid down in *Leonard and Godbolt*. It was an action of trespass for carrying away soil and timber. The question arose upon a quay that was erected at Yarmouth, and destroyed by the bailiffs and burgesses of the town. There was a difference of opinion on the bench, whether, if it were erected between the high-water mark and low-water mark, it belonged to him who had the adjoining land, or to the King? But it was agreed that an intruder upon the King's possession might have an action of trespass against a stranger, but that he could not make a lease whereupon the lessee might maintain an *ejectione firme*. Now that is an authority to shew that an intruder may have a possession sufficient to enable him to maintain an action against a person who does an injury to that possession, but that he cannot maintain any action in which it would be necessary to prove title. Apply that doctrine to this case: the plaintiff had no title to enable him to maintain an ejectionment, because he had not a legal conveyance from the Crown; but still, according to the authority in *Aleyn*, he would be entitled, by reason of his actual possession, to maintain trespass against a wrong doer. These are certainly conflicting authorities; but the case in *Aleyn* is later in point of time than that in *Leonard*; and I think that the rule laid down in *Aleyn* is more reasonable, *because it is better calculated to prevent wrongful trespasses than that of the former case. It is useful

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† *Aleyn*, 10, 11.

that the party whom the King allows to have the actual possession should be at liberty to call to account individuals who commit trespasses on the land, rather than the Crown should be driven to its prerogative process, to punish minute trespasses.

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But assuming that the doctrine in 4 Leonard, 184, is correct in point of law as applied to intruders, then the question arises, whether the plaintiff comes within the character of an intruder. It seems to me that he does not. I consider an intruder to be not merely a person who comes in without any legal sanction from the Crown, but one who comes in, if not against the will, at least without the knowledge of the Crown. Here the plaintiff was in the actual possession with the consent and concurrence of the Crown. It seems to me, that if an information had been filed against him as an intruder, it would have been a good answer in point of law, for him to shew, that by licence from the Crown, he was in possession and in the actual occupation of the land. There is a material distinction between what is essential to be done to convey a title from the Crown, so as to take away its right, and what is necessary to be done to confer a privilege so as to prevent a party exercising that privilege from being a wrong doer. A title to Crown land can only be acquired by matter of record, but the Crown may by parol confer privileges so as to take away from itself the power of treating the party exercising the privilege as a wrong doer. A corporation can only grant by deed, yet there are many things which a corporation has power to do otherwise than by deed. It may appoint a *bailiff, and do other acts of the like nature. It appears to me, then, that the plaintiff was in the actual possession of the land, and notwithstanding the authorities cited from Leonard and Godbolt, I am of opinion, that actual possession of Crown land, with the consent of the Crown, is sufficient to entitle the party possessing it to maintain trespass against persons who have no title at all, and who are mere wrongdoers.

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The only remaining question is, whether there was sufficient evidence to shew that this was a public footway at the time when the action was commenced. By the Inclosure Act, which passed in 1805, all roads which had previously existed were to

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be discontinued, unless the commissioners otherwise directed by their award. Now, there was no such provision in the award as to this foot-path; but it appeared, that since 1805 it had been used by the public, and it was argued, that such user was sufficient to warrant a court of law in holding it to be a public road. But the right of soil is in the Crown, and this cannot be a public way by dedication, unless there be some evidence to shew, that the owner has consented to such user. *Wood v. Veal*† is an express authority to shew that the consent of the lessee is not sufficient for that purpose, because it cannot bind the owner of the inheritance. It was there held, that the owner of the fee when the lease expired, had a right to prevent the public from going along the road, notwithstanding it had been used by the public during the term. Besides, I think also, that this road was used with the consent of any person *in the occupation of the land. Upon the whole, therefore, I am of opinion, that the rule for a new trial ought to be discharged.

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HOLROYD, J. :

After the very clear exposition of the law applicable to this subject by my brother BAYLEY, and the comments which he has made on the different cases, it will not be necessary for me to give my opinion at any length. I agree that the plaintiff took no legal estate from the Crown, because the provisions of the statute 1 Ann. c. 7, s. 5, have not been complied with, and he could not, therefore, maintain an action of ejectment, because he could not make any lease to vest an interest in the nominal plaintiff. The action of ejectment, and the action of trespass are very different in their nature. It is clearly established with respect to private property, that trespass may be brought by a person in the actual possession against a wrong doer, or a person who has no right to enter upon the land, or to do any act which is an injury to the actual possession. And, although there appears to be some difference between the circumstances of the case in *Aleyn*, and that in *4 Leonard*, 184, inasmuch as in the former there may be ground for saying that the Crown was not

† 24 R. R. 454 (5 B. & Ald. 454).

entitled to possession of the land until office found, I think that the latter case explained as it is by the case in the Year Book, 19 Edw. IV., shews that the same rule of law applies to an intruder upon the possession of the Crown, as to a person wrongfully in the possession of private property. If the Crown had treated the plaintiff as an intruder, and had proceeded against him as a person in the wrongful occupation of the land, that might have made it a very different case; but so far from any *thing of that kind having taken place, the occupation by the plaintiff appears to have been by the permission of the Crown. That permission was not sufficient to vest in him the legal interest in the land. As between the Crown and the plaintiff, the right of possession was not taken away from the Crown, as it would have been if the owner of the land had been a private person. The parol demise then would have created a tenancy from year to year, or a tenancy at will. But, although that is not so as to land belonging to the Crown, yet, I think, the actual occupation of Crown land, and enjoyment of the profits, does, as between the person in such enjoyment and possession and a mere stranger, constitute a right which entitles the former to maintain trespass against any person coming to deprive him of any of the fruits of that possession. The doctrine laid down in the case in Leonard is consistent with the principles which prevailed in earlier times. According to the old rule it was an answer to an action of trespass brought against a wrong-doer for the defendant to shew that the right of soil was in a third person. For, although it was necessary for a defendant to allege in his plea that he entered by the command of the owner of the soil, the plaintiff was not at liberty to traverse the command. But that doctrine has been overruled by later cases. The law now is, that an entry on the possession of another cannot be justified, unless it be made by the authority of a person in whom the right of soil is vested. So, in this case, the question was not whether the plaintiff had a legal title to the land, but assuming that he could not retain the actual possession against the Crown, the question was, whether he was entitled to that possession against a third person, as the *Crown did not treat him as a wrong doer.

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Although he could not retain the possession against the King, I think he may maintain trespass against a wrong doer, but even against him he cannot maintain ejectment.

It appears to me, that the payment of the rent, the exercise of the privilege of shooting over the land, and the actual cutting of the grass by the plaintiff's permission, was sufficient evidence to go to the jury, and for them to find that the plaintiff was in the actual possession of all but the trees. The actual taking of the grass by Wallace did not divest the plaintiff of his possession, because the former took it not in his own right, but by permission of the plaintiff, and retained it only by his permission. I think there is no pretence for saying that there was any dedication of the way to the public.

LITLEDALE, J. :

I am of the same opinion. Generally speaking, trespass may be maintained by a person in the actual possession of land against a wrong doer, even where that possession may be wrongful as against a third person. If a tenant hold over after the expiration of his lease, or incur a forfeiture by committing waste or otherwise, the landlord would have a right to enter, and as against him the tenant would have no right of possession ; yet if the landlord permitted him to continue in the actual possession, he might maintain trespass against any person entering upon him, not having a better title than himself. A party, therefore, may be in such a situation, that he may be turned out himself, by a person having a better title, but not by a stranger. *Graham v. Peat*[†] is a very strong case upon this subject. There the plaintiff was in possession of glebe land, under a lease which had become void by the non-residence of the rector, and it was held, that after the lease had become void, the lessee had a sufficient possession to enable him to maintain trespass against a wrong doer ; and the rector who had rendered this lease void by his own non-residence, afterwards recovered possession of the land in ejectment : *Frogmorton d. Fleming v. Scott*.: That is a direct authority to shew that a party having no title as against his landlord, may still maintain trespass

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† 6 R. R. 268 (1 East, 244).

† 6 R. R. 477 (2 East, 467).

against a wrong doer. The case in 4 Leonard, 184, which is very loosely reported, is the only authority for the position, that an intruder on the possession of the Crown cannot maintain trespass, but that probably was considered to be new law, for one of the Judges did not agree to the decision, and it was subsequently overruled by the case of *Johnson v. Barrett*, although, perhaps, that case may more properly apply where office is necessary to entitle the Crown to possession. I, however, cannot consider that a person who is in possession of land by permission of the Crown, although without title, is an intruder. The plaintiff here does not claim under the Crown any interest for life, or for years; he merely claims the actual possession. Perhaps the Crown might call upon him to account for the whole profits which he has received from the land; but it does not therefore follow that he may not have as much right to maintain an action against a wrong doer, as the plaintiff in *Graham v. Peat*, for there the rector afterwards recovered *the premises in ejectment, and was, of course, entitled to the profits of the land. I am, therefore, of opinion, that so long as the plaintiff had the land by licence from the Crown, he had a sufficient possession to enable him to maintain trespass against a wrong doer. I also think that there was sufficient evidence for the jury to find that he was in the actual occupation of the land, and that there was no proof of a dedication of the way to the public. The rule for a new trial must, therefore, be discharged.

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Rule discharged.

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WRIGHT v. COURT AND OTHERS.

(4 Barn. & Cross. 596—598; S. C. 6 Dowl. & Ry. 623; 4 L. J. K. B. 17.)

A constable arresting a man on suspicion of felony must take him before a justice to be examined as soon as he reasonably can: therefore a plea justifying a detention for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses and bringing them to prove the felony, was held bad on demurrer. *Semble*, that a constable cannot justify handcuffing a prisoner unless he has attempted to escape, or unless it be necessary in order to prevent his doing so.

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TRESPASS and false imprisonment. The declaration alleged that the defendants on the 3rd of November, 1824, assaulted and imprisoned the plaintiff upon an unfounded charge of felony, and kept him so imprisoned till the 6th of November, when they handcuffed him and took him before a justice, and there again imprisoned him for 12 hours. Plea first, not guilty; secondly, as to the assaulting and imprisoning the plaintiff for the space of time in the declaration first mentioned, and afterwards handcuffing him, and taking him before a justice, and imprisoning him there for the time secondly mentioned in the declaration, defendants said, that a felony had been committed in the warehouse of one Clarke; the plea then stated circumstances from which they suspected that plaintiff was concerned in the felony, wherefore Court being a constable, and the others as his *assistants took plaintiff and imprisoned him for the space of time in the declaration mentioned in that behalf, in order to carry him before a justice, the same being a reasonable time for that purpose and for the purpose of informing Clarke of the apprehension of the plaintiff upon such suspicion, and for the purpose of enabling Clarke to procure the necessary evidence, and collect the necessary witnesses, to prove the facts of the said felonious stealing, &c.; and the defendants further said, that on the said 6th of November they handcuffed plaintiff as in the declaration mentioned, in order to prevent his escape, and took him so handcuffed before a justice, to be then and there interrogated and examined touching the said felony, and the justice directed him to be detained for further examination; wherefore defendants again imprisoned him for the space of

time in the declaration in that behalf mentioned. There were other pleas similar in substance. Demurrer and joinder.

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Curwood in support of the demurrer contended, that the causes of suspicion mentioned in the plea were insufficient.

Oldnall Russell, contra, contended that they were reasonable grounds of suspicion, and, therefore, a justification to the constable and his assistants.

Per CURIAM :

The plaintiff alleges that he was imprisoned for three days, and the first special plea admits that he was imprisoned for that space of time before he was taken to the magistrate for examination, and avers that it was a reasonable time for that purpose, and for enabling Clarke to collect and bring his witnesses *to prove the felony. But it is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can,† and the law gives no authority even to a justice to detain a person suspected, but for a reasonable time till he may be examined.‡ The justice might have been justified in ordering this plaintiff to be detained until Clarke could bring his witnesses, but it is clear that the defendants had no authority to detain him without such order. The defendants have also justified handcuffing the plaintiff in order to prevent his escape, but they do not aver that it was necessary for that purpose, or that he had attempted to escape. For these reasons the special plea is insufficient, and judgment must be given in favour of the plaintiff.

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Judgment for the plaintiff.

† Com. Dig. Imprisonment, H. 4.

‡ Ib. H. 5.

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THE KING *v.* MONTAGUE AND OTHERS.†

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(4 Barn. & Cress. 598—605; S. C. 6 Dowl. & Ry. 616; 4 L. J. K. B. 21.)

A public right of navigation in a river or creek may be extinguished either by an Act of Parliament or writ of *ad quod damnum* and inquisition thereon, or under certain circumstances by commissioners of sewers, or by natural causes, such as the recess of the sea or an accumulation of mud, &c., and where a public road obstructing a channel (once navigable) has existed for so long a time that the state of the channel at the time when the road was made cannot be proved; in favor of the existing state of things it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to that navigation.

Every creek or river into which the tide flows is not on that account necessarily a public navigable channel, although sufficiently large for that purpose, per BAYLEY, J.

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INDICTMENT for cutting a trench across a common and ancient King's highway, leading from the parish of Hoo, in the county of Kent, unto and through the parish of Stoke in the county aforesaid, and thence unto and into the parish of Saint James in the Isle of Grain in the said county, used for all the King's subjects with horses, carts, and carriages, &c. Plea, not guilty. At *the trial before Graham, B. at the Surrey Summer Assizes, 1824, (the indictment having been removed into that county for trial by rule of this Court) it appeared in evidence that the road in question was an embankment across Yantlet Creek, which runs on the west side of the Isle of Grain, and unites the Thames and the Medway. The defendants cut down the embankment by order of the corporation of London, who contended that Yantlet was a public navigable stream, and that the road improperly obstructed it. It was proved that from time to time during the last 20 years the road had been raised by the inhabitants of Stoke and Grain, and had during all that time been made so high that no boats could pass over it at any time, but for 30 or 40 years preceding, light boats drawing but little water had occasionally been able to pass over for half an hour before and after high water, and several instances of their having done so were spoken to by the witnesses. When the embankment or road had been removed, the remains of an

† Cited by KEKEWICH, J., in *Ilchester v. Raishleigh* (1889) 61 L. T. 480.

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ancient bridge were discovered; it appeared to have been of considerable dimensions both in height and width, but no evidence could be adduced as to the time when it was erected, or when it fell to decay, nor to shew for what purpose it was built, whether for the purposes of the navigation of the creek, or merely to support the road from Stoke to the Isle of Grain. But it was contended for the defendants that the size of the arch being sufficient for navigation, and greater than was necessary for the purposes of the road, it must be presumed to have been so constructed in order that it might not impede an existing navigation; and that if there had at any time been a public navigation through the creek, it could not be legally put an end to without *an Act of Parliament. The learned Judge in summing up assumed that there had been a public navigation through the creek, but said it was probable that it had been obstructed by a natural deposit of silt and mud, and that the bridge might, on that account, have been suffered to go to decay, and the causeway made in lieu of it. That the only evidence of actual navigation was by very small boats at certain periods of the tide, and that the defendants could not at all events justify cutting away the embankment more than was necessary to open the navigation to such boats to the extent spoken of by the witnesses. The jury having found the defendants guilty,

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Gurney, in Michaelmas Term, obtained a rule *nisi* for a new trial, upon the ground that the learned Judge ought to have left it to the jury to say whether there had been anciently a public navigation through Yantlet Creek, and should have told them that such a navigation could be put an end to by an Act of Parliament alone, according to the doctrine laid down by HOLROYD, J. in *Vooght v. Winch*.†

Marryat (with whom were *D. Pollock* and *Platt*) shewed cause, and *Gurney*, the Recorder of London, the Common Serjeant, *Bolland*, *Tindal*, *Law*, and *Mirehouse* supported the rule. The case was very elaborately argued. On the one hand it was contended that the evidence did not prove that a public

† 21 R. R. 446, 447 (2 B. & Ald. 662, 670).

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navigation had ever existed in the creek; on the other, that there was sufficient evidence in that respect, and that it should have been left to the jury to decide upon it.

[601] BAYLEY, J. :

I am of opinion that there ought not to be a new trial in this case. It has been urged that it ought to have been left to the jury to decide whether there had or had not been a public navigation through Yantlet Creek; but the learned Judge appears to have put the case even more favorably for the defendants, for the whole of his summing up was founded upon a supposition, that at some far distant period there was such a navigation. Even if there had been a defect in the direction in that respect, we ought not to grant a new trial, if we are satisfied upon the evidence either that there never was a public navigation, or that it had been legally put an end to. It was for the defendant to make out that there once was a public navigation. Now it does not necessarily follow, because the tide flows and reflows in any particular place, that it is therefore a public navigation, although of sufficient size. In *The Mayor of Lynn v. Turner*,† which was error from the Common Pleas, it appeared that Turner brought case against the corporation of Lynn for not repairing and cleansing a certain creek or fleet, called Dowshill Fleet, into which the tide of the sea was accustomed to flow and reflow, as from time immemorial they had been used, whereby the sea was prevented from flowing therein, so that the creek was rendered unnavigable, and the plaintiff obliged to carry his corn round about. The second count contained no allegation of special damage. Judgment by default, and damages assessed on a writ of enquiry. For the plaintiff in error it was contended that the second count was bad, for that the declaration shewed the *locus in quo* to be a navigable river, that it was therefore public, *and no individual could maintain an action for an injury to it without shewing special damage. But Lord MANSFIELD says, “How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which

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† Cowp. 86.

the tide flows which are not navigable rivers, and the place in question may be a creek in their own private estate." Again, in *Miles v. Rose*,† GIBBS, Ch. J. says that the flowing of the tide, though not absolutely inconsistent with a right of private property in a creek, is strong *primâ facie* evidence of its being a public navigable river; and HEATH, J. expresses the same opinion. The strength of this *primâ facie* evidence arising from the flux and reflux of the tide, must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel.

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(The learned Judge then commented at length upon the evidence, to shew the probability that there never had been a public navigation through the creek in question.)

But even supposing this to have been at some time a public navigation, I think that, from the manner in which it has been neglected by the public, and from the length of time during which it has been obstructed, it ought to be presumed that the rights of the public have been lawfully determined. Most probably the rights of the public (if they ever had any) arose from the flux *and reflux of the tides of the sea, so as to make the channel navigable. If then the sea retreated, or the channel silted up, so as to be no longer navigable, why should not the public rights cease? If they arose from natural causes, why should not natural causes also put an end to them? But they might also be put an end to by Act of Parliament, or by writ of *ad quod damnum*, and, perhaps, by commissioners of sewers, if there were any appointed for the district, and they found that it would be for the benefit of the whole level. For these reasons it appears to me, that if this case were sent down for trial again, the jury would be bound to find either that there never was a

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† 15 R. B. 623 (5 Taunt. 705; 1 Marsh. 313).

THE KING ^{r.} public navigation through the *locus in quo*, or that it had
MONTAGUE. been determined by some lawful means. The rule must there-
fore be discharged.

HOLROYD, J. :

I also think that a proper verdict was found in this case. From the great length of enjoyment of the road across Yantlet Creek, every reasonable presumption is to be made that it was lawfully formed. The defence set up against the indictment is, that there was a public right of navigation there, and that the embankment was an obstruction to it. The evidence leads to a conclusion, that there never was a public right of navigation ; but admitting it to have existed at some former period, another question arises, viz., whether it may not have been extinguished. It appears by the report of *Vooght v. Winch*, that I then stated that a public right of this description could only be determined by an Act of Parliament. I am bound to correct that opinion, for upon looking into the authorities, I am satisfied that it may be done by a writ of *ad quod damnum*, and *an inquisition found thereupon by a jury. So, also, it may be extinguished by natural causes. In Com. Dig. Chimin (A 1), it is said "A navigable river is in the nature of a highway, and if the water alters its course, the way alters, per THORP, 22 Ass. 93," and in that book, it is thus stated "*et nota*. THORP saith, If a water be a high street, which water by its own force changes its course upon another soil, yet it shall have there the same high street as it had before in its ancient course, so that the lord of the soil cannot disturb the new course," which is not merely the dictum of THORP, J. but he states it to have been so held in the case of *Nottingham*. It seems, therefore, that the right of way which existed on account of the navigation of the river, ceased in the original channel when the river changed its course, but followed the river to its new course. If then the water of the sea recedes so that a stream formerly navigable ceases to be so, why should not the rights of the public be extinguished, particularly where other rights have been superinduced, as the right of way in the present case? The right of way might also be extinguished by writ of *ad quod damnum*. In Fitz Nat.

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Bre. 515, it is said, "If there be an ancient trench or ditch coming from the sea, by which boats and vessels use to pass to the town, if the same be stopped in any part by outrageousness of the sea, and a man will sue to the King to make a new trench, and to stop the ancient trench, &c., they ought first to sue a writ of *ad quod damnum* to inquire what damage it will be to the King or others." There is no doubt that such a public right may be extinguished by Act of Parliament. In favour of the long enjoyment of the road in its present state, I think that we are bound to presume, that if a right of public navigation ever existed, *it was determined by one or other of the means to which I have alluded, and, if that were so, the defendants were properly found guilty.

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LITTLEDALE, J. :

I am of the same opinion. There were two questions in this case ; first, whether anciently this was a continuing subsisting navigation used by the public ; and, secondly, whether that was put an end to by legal means. Upon looking through the evidence, I think that this never was a continuing subsisting navigation used by the public. But supposing it to have been so, then was it legally put an end to ? That might be done by Act of Parliament, by writ of *ad quod damnum*, and, I conceive, under certain circumstances by commissioners of sewers. I agree that, in order to quiet possessions, we ought to make all reasonable presumptions in favour of the existing state of things. But I am not disposed to act upon the presumption ; either of an Act of Parliament, or a writ of *ad quod damnum*, or proceedings by commissioners of sewers, unless there be some evidence to warrant that presumption. In the present case, it appears to me a more reasonable presumption, that the passage, if it ever existed, was stopped up by natural causes, by the recess of the sea, or by an accumulation of silt and mud, which we know by experience is constantly going on in many of the harbours of this country, and by which they would eventually be choked up, unless artificial means of cleansing them were adopted. For these reasons I think that the verdict ought not to be disturbed.

Rule discharged.

1825.

[606]

DOE ON THE DEMISE OF MORECRAFT *v.* MEUX
AND OTHERS.†

(4 Barn. & Cress. 606—610 ; S. C. 7 Dowl. & Ry. 98 ; 4 L. J. K. B. 4 ; S. C. at Nisi Prius, 1 Car. & P. 346.)

Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months: Held, that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months.

EJECTMENT for the recovery of certain premises in the parish of St. Paul, Covent Garden, in the county of Middlesex. The demise was laid on the 27th of December, 1823. At the trial before Abbott, Ch. J., at the Westminster sittings after Trinity Term, 1824, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case. The lessor of the plaintiff on the day of the demise and still, was and is landlord of the premises in question. By indenture of lease made the 1st of June, 1769, between S. Rowley and J. Rowley of the one part, and J. Chase and J. Cox on the other part, S. Rowley and J. Rowley demised the premises in question to J. Chase and J. Cox, for seventy-three years and a quarter, from Lady Day, 1769, with the usual reddendum and covenant, to pay rent, and containing covenants of the lessees for themselves and assigns, and a clause of re-entry, as follows: "And the said J. Chase and J. Cox, for themselves, their executors, &c., do and each of them doth covenant, that they, their executors, &c., shall and will, at their own proper costs and charges, from time to time and at all times hereafter, during the term hereby granted, when and as often as need shall be, well and sufficiently repair, support, and keep the said messuage, &c. in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, and so yield them up at the end of the term. And further, that it shall and may *be lawful to and for the said S. Rowley and her assigns, during the continuance

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† Distinguished in *Few v. Perkins* (1867) L. R. 2 Ex. 92, 95 ; 36 L. J. Ex. 54.

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of her estate in the said demised premises, and after the determination thereof, to and for the said J. Rowley, his heirs, and assigns, &c., at her, his, or their free wills and pleasures, at any convenient hour in the day time, twice, or oftener in every year of the said term, to enter upon the premises, and see the state and condition of the reparations of the same; and of all defects and want of reparations then and there found, to give or leave notice or warning in writing, at the said demised premises, unto or for the said J. Chase and J. Cox, their executors, &c., to repair and amend the same within three calendar months then next ensuing; within which space of three months the said J. Chase and J. Cox, for themselves, their heirs, executors, &c., do covenant to repair and amend all such defects, of which such notice or warning shall be so given. Proviso for re-entry if Chase and Cox, their executors, &c., shall not perform, fulfil, and keep all and singular the covenants in the said lease, to be by them performed, &c." The said term and interest in the premises, vested in the defendants, before the dilapidations and notice to repair hereinafter mentioned. The premises being in some respects out of repair, the lessor of the plaintiff on the 7th of August, 1823, caused a written notice to repair to be served on the defendants, requiring them to do certain necessary repairs therein mentioned, within three months then next following, in these words: "I do hereby require you to repair and amend the same within the space of three calendar months, from the delivery of this notice, as witness my hand this 6th day of August, 1823. W. MORECRAFT." On the 24th of October, 1823, the lessor of the plaintiff *received of the defendants half a year's rent, to September 29th, 1823. The declaration in ejectment in this cause was served on the 28th of October, 1823, being previously to the expiration of the said three months' notice to repair. The premises were and continued out of repair from the time of serving the said notice to repair, until the time of the trial of this action.

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Chitty, for the plaintiff:

The covenants in this lease to keep the premises in repair generally, and to repair within three months after notice, are

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independent covenants, and a breach of either operated as a forfeiture of the lease. The case in this respect differs from *Horsefall v. Testar*,† where all that related to the repairs was one covenant. It will, perhaps, be urged, that the notice to repair which was given in this case, operated as a waiver of the forfeiture; but it could not have that effect, being analogous to a second notice to quit, which has been held not to be a waiver of the first. In *Roe d. Goatly v. Paine*,‡ it appeared that a lease had been made with covenants similar to those in question, viz. to keep the premises in repair, and to repair within three months after notice. The landlord gave a notice to repair forthwith, and brought ejectment within three months after giving that notice, and Lord ELLENBOROUGH held, that the notice was not a waiver of the forfeiture. The word “forthwith” in that notice may be relied on as making a distinction, but if the covenants are independent, the notice to repair within three months cannot affect the forfeiture incurred by *a breach of the general covenant to keep the premises in repair at all times during the term.

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Brougham, contra, was stopped by the COURT.

BAYLEY, J.:

The landlord in this case had an option to proceed on either covenant, and after giving notice to repair within three months, he might have brought an action against the defendant upon the former covenant for not keeping the premises in repair. But that is very different from insisting upon the forfeiture. It is said that the premises being out of repair on the 6th of August, when the notice was given, the lease was thereby forfeited. But the landlord has affirmed that the lease subsisted up to the 29th of September, by receiving the rent which became due at that period. It is plain, therefore, that he did not intend to insist upon an immediate forfeiture at the time when the notice was given, and I think that notice amounted to a declaration that he should be satisfied if the premises were repaired within three months, and that he thereby precluded

† 7 Taunt. 385.

‡ 2 Camp. 520.

himself from bringing an ejectment before the expiration of that period. In *Roe v. Paine* the language of the notice was very different, the tenant was required to put the premises in repair *forthwith*; that did not prevent the landlord from bringing his ejectment at any time. That case therefore is no authority for the present lessor of the plaintiff, and for the reasons already given I think that our judgment must be for the defendants.

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HOLROYD, J. :

I am of opinion that this ejectment was brought too soon, for it appears to me that the notice *requiring the tenant to repair within three months was equivalent to an admission that the tenancy would continue up to the expiration of that time. If it did not operate as a waiver of the forfeiture incurred by breach of the covenant to keep the premises in repair, the landlord might be able to bring ejectment after the tenant had put the premises into complete repair pursuant to the notice; which would be extremely unjust. But I think that although the action for breach of covenant would remain, yet the forfeiture was waived. The defendants are, therefore, entitled to our judgment.

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LITTLEDALE, J. concurred.

Postea to the defendants.

1825.

PICKERING v. NOYES.

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(4 Barn. & Cress. 639—648; S. C. 7 Dowl. & Ry. 49; 4 L. J. K. B. 10.)

Trespass for breaking and entering two closes, parcel of Forton Farm. Plea, that one J. W. before and at the time when, &c. was seised in fee of 50 acres of land next adjoining the *locus in quo*, and that by deed of the 17th of February, 1736, between F. C. who was seised in fee of the *locus in quo*, and one R. W. who was seised in fee of the 50 acres, F. C. granted to R. W. and his heirs and assigns, for the time being owners in fee of the 50 acres, the liberty and privilege of hunting for game with dogs in the *locus in quo*. The plea then justified the trespass as the servant of J. W. Replication, that F. C. did not grant the liberty and privilege as in that plea mentioned, upon which issue was joined. At the trial there was no proof of any such grant as that stated in the plea, but it appeared that by a deed of that date R. W., being then seised in fee of the manor of Middleton, conveyed Forton Farm to F. C., reserving all royalties; but it appeared further that from the year 1753 the gamekeepers of the lord of the manor of Middleton were accustomed to sport over Forton Farm with the knowledge of the plaintiff and his landlords the owners of Forton Farm; that about 14 years ago the plaintiff by desire of his landlord gave notice to the then gamekeeper of the lord of the manor not to trespass, but he afterwards continued to sport there by order of the lord, without any further interruption: Held, that upon this evidence a jury ought not to have presumed a grant.

Another plea stated that before the said time when, &c. R. W. was seised of the closes in which, &c., and by indenture of the 17th February, 1736, granted unto F. C., his heirs, &c. the closes in which, &c. with a reservation of all royalties. The plea then deduced a title in the said royalties, from R. W. to J. W. and then justified entering the closes as his servant. Replication, that the defendant did not enter in order to exercise the said royalties, upon which issue was joined. Held, that it lay upon the defendant upon this issue to prove, first, that he had such a royalty; and, secondly, that at the time in question he was in the due exercise of it; and *semble*, that that could only be done by proving a grant of a free warren from the Crown.

TRESPASS for breaking and entering certain closes, part and parcel of a farm called Forton Farm, situate in the parish of Long Parish, in the county of Southampton, and hunting for game in, upon, and over the same closes, and treading down the grass, &c. On the first four pleas no question arose: the defendant pleaded, fifthly, that one James Widmore, before and at the said several times, when, &c., was seised in fee of, and in divers, to wit, fifty acres of land, situate next and adjoining to the said closes in which, &c., and that by deed dated the 17th of February, 1736, and made between one Sir Francis Child, who was seised in

fee of the closes in which, &c., and one Richard Widmore, who *was seised in fee of the fifty acres of land, and whose estate therein James Widmore at the said times when, &c., had, the said Sir F. Child did grant to R. Widmore and his heirs and assigns, for himself and themselves, for the time being owners in fee of the said fifty acres of land, the liberty and privilege by himself and themselves, and his and their servants, of hunting for game with dogs in the said closes, at his and their free will and pleasure, as belonging and appertaining to the said last mentioned lands; and the defendant then justified the trespasses as the servant of J. Widmore. Sixthly, as to entering the closes and treading down and bruising a little the grass, &c., that long before the said time, when, &c., one R. Widmore was seised in fee of and in the closes in which, &c., and being so seised by indenture dated the 17th February, 1736, made between said R. Widmore of the first part, Sir F. Child of the second part, and W. Guidott and A. Guidott of the third part, (but which deed is since lost, &c.) the said R. Widmore did grant unto Sir F. Child and his heirs the said several closes in which, &c. (in which said closes there then was, and still is a certain river), except and always reserved unto R. Widmore and his heirs, all royalties, and the soil of the river; that Sir F. Child entered into the said closes in which, &c., and was seised thereof in his demesne as of fee (subject to the exception and reservation aforesaid), and the said royalties and the soil of the river then belonging to R. Widmore. The defendant then deduced a title in the said royalties and the soil of the said river from R. Widmore to one J. Widmore, his heirs and assigns, and pleaded that he the defendant, as the servant of J. Widmore, and by his command at the said several times when, &c., entered the said several closes in which, &c., *to exercise the said royalties and right of soil, and justified the aforesaid trespasses in so doing. To the fifth plea the plaintiff replied, that Sir F. Child did not grant to R. Widmore the liberty and privilege as in that plea mentioned. To the sixth plea that the defendant did not at the said times, when, &c., enter into the said closes, in which, &c., to exercise the said royalties and right of soil in the said sixth plea mentioned; upon which replications, issues were joined. At the trial before Abbott, Ch. J., at the last Summer Assizes for the county of

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Southampton, a verdict was found for the plaintiff, with forty shillings damages, subject as to the issues taken upon the fifth and sixth pleas to the opinion of this Court on the following case.

The defendant on the day mentioned in the declaration, after notice from the plaintiff not to trespass, entered the closes mentioned in the declaration, being parcel of Forton Farm, for the purpose of beating for and shooting game there, and did beat for game there with dogs. The defendant at that time was the gamekeeper of J. Widmore, Esq. (in the pleadings mentioned), duly appointed by him as lord of the manor of Middleton, otherwise Long Parish, in respect of the same manor; and at the time of committing the supposed trespasses was acting as such gamekeeper, and by the order of Mr. Widmore. Forton Farm contains about 570 acres of land, and every part thereof is situate within the compass or ambit of the said manor or reputed manor, of which manor and farm, as also of a certain messuage and lands called Middleton Farm, otherwise Long Parish Farm, adjoining to part of the lands of Forton Farm, one R. Widmore, long before and until and at the time of the conveyance to Sir F. Child hereinafter mentioned, *was seised in fee simple. The said manor or reputed manor was by the name of the manor or Lordship of Middleton, alias Long Parish, together with the messuage and farm called Middleton, otherwise Long Parish Farm, and all fisheries, privileges, and royalties to the said manor or farm belonging, conveyed to the said R. Widmore in fee simple, in 1698. And the estate of Forton Farm was conveyed to R. Widmore in fee simple in 1706, by a different grantor. R. Widmore being seised of the several premises as aforesaid by deed dated the 17th February, 1736, made between himself Widmore of the one part and Sir F. Child of the second part, granted, bargained, sold, and released to Sir F. Child, (in the pleadings mentioned) the tenement and farm called Forton Farm, together with the liberty and use of the river and water for watering certain water meadows, except and always reserved, unto R. Widmore and his heirs, three closes particularly named (not being the closes in question) and also all royalties and soil of the river, to hold the same with the fishery, and liberty of fishing in certain parts of the river unto Sir F. Child, and his

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heirs and assigns, to the use of Sir F. Child, his heirs and assigns, for ever. J. Widmore at the said time when, &c., was seised in fee of the said manor or reputed manor, and the messuage and farm called Middleton, otherwise Long Parish Farm, deriving its title thereunto from R. Widmore, of whom he is heir-at-law. Forton Farm has been in the occupation of the plaintiff nearly fifty years last past, as tenant under W. Iremonger Esq. (the present owner), and his father and grandfather respectively, all deriving their title to the same under the conveyance to Sir F. Child. The plaintiff has been accustomed during his tenancy to *sport at his pleasure, and without interruption over Forton Farm. The grandfather and father of W. Iremonger (the latter of whom died about six years ago) were not themselves accustomed to field sports, but they resided at a house, called Wherwell House, very near to Forton Farm, and during their respective lives, their friends, and also W. Iremonger, during his father's life-time, and since his decease up to the present time, have been accustomed to sport over Forton Farm, without interruption of the lord of the manor, or his gamekeeper for the time being. As far back as the year 1753 (being as far back as can be traced), there are entries in the office of the clerk of the peace for the county of Hants, of the appointments of gamekeepers for the manor of Middleton, otherwise Long Parish, by the lords for the time being of the said manor. And evidence on the part of the defendant was given at the trial, that for nearly fifty years last past, the gamekeepers of J. Widmore, and his predecessors, were accustomed to sport over Forton Farm, with the knowledge of the plaintiff, and his landlords, and without any interruption, until about fourteen years ago, when the plaintiff by the desire of the landlord gave a notice to the then gamekeeper of J. Widmore, then sporting upon the said farm, not to trespass there; but the gamekeeper on the receipt of the notice, informed the plaintiff that he sported there by the orders of his master, and he continued to sport there after the notice, without any further interruption.

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Halcombe, for the plaintiff. * * *

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The Court called upon *Carter* to support his pleas.

Carter, for the defendant :

[*646] Upon the replication to the sixth plea it must be taken that the grantor mentioned in the deed of 1736 had the royalties which he professes by that deed to reserve. That is the necessary effect of the replication, and if the plaintiff did *not intend to admit that fact, he ought to have demurred to the plea.

(BAYLEY, J. : We are of opinion that upon the issue taken upon this replication it was incumbent on the defendant to prove two things ; first, that he had such a royalty, and, secondly, that at the time in question he was in the due exercise of it. But this is not the usual or proper way to plead a right of free warren, nor is there any evidence to prove it. The defendant ought to have produced his grant, which is matter of record, or, at least, shewn that due search had been made for it in the proper offices where it was likely to have been found, and among Mr. Widmore's title-deeds. Such a right must be very strictly proved.)

Taking issue upon the motive is an improper replication, and admits the existence of the royalty as reserved by the deed of 1736. A free warren is not necessarily an *exclusive* right, but may be exercised by others, conjointly with the owner of the soil, as in *Davies's* case,† where a prescription for the lord of the manor, his tenants and farmers, to fowl in the warren of another, was held good, upon demurrer.

The deed pleaded by the fifth plea, although without profert, or an excuse for it, may be presumed, as any other non-existing grant.

(BAYLEY, J. : But it is pleaded with a date, and not as a non-existing grant. There is a deed of the same date produced, which differs from that stated in the fifth plea ; and can any other of the same date, and between the same parties, be presumed ?)

The evidence is, that for a great length of time the right of

† 3 Mod. 246.

sporting over the estate in question has been claimed and exercised by those under whom the defendant justifies, *without interruption from the plaintiff or his landlord, and notwithstanding a notice not to trespass given by the plaintiff to a former gamekeeper, about fourteen years ago. It was competent, therefore, to presume the deed pleaded by the fifth plea.

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Halcombe, in reply :

The usage proved has all been within the period of the plaintiff's tenancy of the estate, and the landlord's acquiescence cannot be inferred. There is no injury to the reversion, and the landlord could not have brought an action for any trespass in sporting over the land, because in his action he must aver and prove that the reversion has been injured :† *Jackson v. Pesked*.‡ He will not, therefore, be bound by any usage of this description during the tenant's occupancy, which, for any thing that appears, the tenant may have authorised, and the reversioners had no power to prevent: *Daniel v. North*,§ *Wood v. Veal*.|| The plaintiff has no estate of inheritance in the land, and, therefore, if the defendant would have availed himself of the plaintiff's acquiescence for so long a period of time, he should have pleaded his right not as a grant, by which the inheritance is to be affected, but as commensurate only with the particular estate of the plaintiff.¶

BAYLEY, J. :

For the reasons already stated, we think that the verdict on the issue joined on the replication to the sixth plea must be entered for the plaintiff. As to *the issue joined on the replication to the fifth plea, it has been very properly left to us to consider whether the grant pleaded by that plea might not have been presumed; and it has been urged that the fact of the defendant having continued to sport after the plaintiff's notice served upon him, fourteen years ago, without any further interruption, was some sort of proof in support of his alleged right.

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† 1 Saund. 322 b (n. 5).

|| 24 R. R. 454 (5 B. & Ald. 454).

‡ 14 R. R. 417 (1 M. & S. 234).

¶ 2 Saund. 175 d (n.).

§ 11 East, 372.

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But we are of opinion that, upon such evidence, a jury ought not to have presumed a grant. We all know that a very mistaken notion long prevailed that the lord of a manor had a right to go not only over his own lands, but over the lands of others within his manor;† and it seems probable that such was the case in the present instance; or it may have been that the ancestors of Col. Iremonger, who were not themselves accustomed to field sports, gave permission to the lord of the manor, as their immediate neighbour, to sport upon their estate, not exclusively, but jointly with their own friends and tenants; and the going over land for the purposes of sporting is certainly not an injury to the reversion. The verdict on that issue also must therefore be entered for the plaintiff.

Judgment for the plaintiff.

K. B. MICHAELMAS TERM.

THE KING v. MCKAY.

(4 Barn. & Cress. 658—659; S. C. 4 L. J. K. B. 37.)

Where a defendant is ousted on *quo warranto*, the prosecutor is entitled to the writ of *mandamus* for a new election, if he applies in reasonable time. If he does not the defendant is entitled to move for the writ.

THE defendant having been found guilty at the last Hampshire Assizes, upon an information for usurping the office of bailiff of Stockbridge; on the 6th day of the present Term,

Merewether on the part of the defendant moved for a *mandamus* to the corporation to proceed to the election of a new bailiff.

Carter said that he was instructed by the prosecutor to move for the writ.

† This sentence is cited by Cockburn, Ch. J., in giving judgment in the Exchequer Chamber in *Sowerby*

v. *Smith* (1874) L. R. 9 C. P. 524, 332; 43 L. J. C. P. 290, 294.—R. C.

Merewether contended that the prosecutor should have applied sooner ; but,

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HOLROYD, J.† after consulting the officers of the Crown Office, held that the prosecutor was entitled to the writ, as he had not been guilty of any unreasonable delay in making the application.

Writ refused.‡

We have been favored with the following note of a case which occurred in Trinity Term, 1819: *Rex v. Mears*. The defendant in a *quo warranto* information for usurping the office of mayor of Petersfield disclaimed, and before judgment was signed moved for a mandamus to proceed to a new election, but BAYLEY, J. said, that the prosecutor ought to have a priority of motion, and should be allowed a reasonable time to sign judgment and apply for a writ.

The prosecutor signed judgment a few days afterwards, but declined to move for the writ, which was thereupon granted to the defendant.

HALL v. HOLLANDER.§

(4 Barn. & Cress. 660—663 ; S. C. 7 Dowl. & Ry. 133 ; 4 L. J. K. B. 39.)

1825.
Nov. 14.
[660]

Trespass for driving a carriage against the plaintiff's son and servant, whereby plaintiff was deprived of his services and was put to expense in obtaining his cure. The child was two years and a half old, and the plaintiff might have placed him in an hospital which would not have occasioned any expense, but preferred having him at home : Held, that the loss of service was the gist of the action, and that the child being incapable of performing any service by reason of his tender age, the action was not maintainable, particularly as no expense had been necessarily incurred.

TRESPASS for driving a carriage against the plaintiff's son and servant, whereby he was injured, and the plaintiff, for a long

† The other Judges had not come into Court.

‡ See *Rex v. Corporation of West Loee*, 3 Burr. 1386, and *Rex v. Corporation of Wigan*, 2 Burr. 782.

§ Cited by WILLES, J., in *Evans v. Walton* (1867) L. R. 2 C. P. 615, 623 ; 36 L. J. C. P. 306, 308.—R. C.

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space of time, to wit, &c., was deprived of the service of his said son and servant, and of all the benefit which would otherwise have accrued to him from such service, and was also forced to expend a large sum of money, to wit, &c., in the cure of his said son and servant. Plea, not guilty. At the trial before Abbott, Ch. J., at the Westminster sittings after last Trinity Term, the plaintiff proved that the defendant drove his carriage against the plaintiff's son, then an infant two years and a half old. The child was much injured, and at first was taken to the Middlesex Hospital, where he might have remained without expense to his father, but he was afterwards taken home by his father, who thought he would be better there, and was taken daily to the hospital for advice for some months, at the expiration of which time he was dismissed as cured. The father also hired a servant to attend the child during his illness. Upon this evidence it was objected for the defendant that the child was not competent to perform any service by reason of his tender age, and that as loss of service was the gist of the action, the plaintiff must be nonsuited. The LORD CHIEF JUSTICE was of that opinion, but offered to leave it to the jury to say, whether the child was capable of performing *services to which any value could be attached. The counsel for the plaintiff did not desire the question to be so left, and thereupon the plaintiff was nonsuited.

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*Laure*s now moved for a new trial, and contended that the plaintiff was entitled to recover without proving any actual service by the child. In this respect the case of a child differs from that of a mere hired servant. In the latter case, loss of actual service must be proved; but in the former, the child being resident with and under the control of the parent, must unavoidably be, in legal acceptance, a servant, so as to support an action of this nature: *Jones v. Brown*,† *Fores v. Wilson*.‡ At all events, the plaintiff was entitled to recover the expense which he was put to in obtaining the cure of his son.

BAYLEY, J. :

I am of opinion that the nonsuit in this case was right. It

† 1 Peake, 306; 1 Esp. 217.

‡ 3 R. R. 652 (1 Peake, 77).

has been contended that the action is maintainable on two grounds; first, for the loss of the services of the child, and, secondly, for the expenses incurred by the father, in consequence of the injury sustained by the child. With respect to the first ground, I apprehend that the gist of the action depends upon the capacity of the child to perform acts of service. Here it is manifest that the child was incapable of performing any service. The authorities upon this point are all one way. In the cases which have been cited, the child being capable of performing acts of service, and living with the parent, would naturally be called upon to perform some acts of service; and it was, therefore, *held, that service might be presumed, and that evidence of it need not be given. In *Weedon v. Timbrell*,† both Lord KENYON and ASHHURST, J. say, that the loss of service is the gist of such an action as the present, and that the plaintiff must give some proof of acts of service, in order to support the allegation in the declaration, although very slight evidence is sufficient; and in a case of *Satterthwaite v. Duerst*‡ it was held that an action for debauching a daughter could not be maintained by a father, unless she was his servant, and that the action could not be maintained on the ground of expense having been incurred in providing for her during her confinement. In this case, too, it was proved that the father did not necessarily incur any expense; if he had done so I am not prepared to say that he could not have recovered upon a declaration describing, as the cause of action, the obligation of the father to incur that expense.

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HOLROYD, J. :

It was not established by evidence at the trial that the father was necessarily put to any expense; the Court are, therefore, not called upon to give any opinion upon his right to recover such expenses. It is clear that in cases of taking away a son or daughter, except for taking a son and heir, no action lies, unless a loss of service is sustained: *Gray v. Jefferies*,§ *Barham*

† 5 T. R. 357.

principal case there, *Dean v. Peel*,

‡ K. B. E. T. 25 Geo. III.; 7 R. R. 654, n. (5 East, 47, n.); see also the

7 R. R. 653 (5 East, 45).

§ Cro. Eliz. 55.

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HOLLANDER v. Denner.† The mere relationship of the parties is not sufficient to constitute a loss of service. The reasoning in all the modern cases shews that some evidence of service is necessary ; none could be given in the present case, the nonsuit was, therefore, right.

[663] ABBOTT, Ch. J. :

It is a principle of the common law that a master may maintain an action for a loss of service, sustained by the tortious act of another, whether the servant be a child or not ; and when that foundation of the action has existed, courts of justice have allowed all the circumstances of the case to be taken into consideration, with a view to the calculation of the damages. Here we are required to go further, and to hold that the action is maintainable, although no service was or could be performed by the child, and that too upon a declaration alleging the existence of the relation of master and servant, and the loss of the services of such servant. Such a decision would not be warranted by any former case. The nonsuit, therefore, ought not to be disturbed.

Rule refused.

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THE KING v. THE INHABITANTS OF THE COUNTY OF DEVON.

(4 Barn. & Cress. 670—681 ; S. C. 7 Dowl. & Ry. 147 ; 4 L. J. K. B. 34.)

The inhabitants of a county are not bound to widen a public bridge.

AN indictment stated as follows : “ That on the 10th day of February, in the 4th year of Geo. IV., there was, and from thence hitherto hath been, and still is, a certain common and public bridge, commonly called Dart bridge, lying and being in the parishes of Buckfastleigh and Ashburton, in the said county, being a common highway leading from the city of Exeter, unto and over the said bridge to the town of Plymouth in the said county, for all the subjects of the King on foot and on horseback, and with their horses, coaches, carts, and carriages

† Cro. Eliz. 770.

upon and over the same bridge, to go, return, pass, ride, and travel at their will and pleasure, freely and safely without any obstruction, hindrance, or impediment whatsoever; and that the said common and public bridge, on the 10th day of February in the year aforesaid, and continually afterwards until the day of taking the inquisition at the said parishes of Buckfastleigh and Ashburton in the said county, was and yet is ruinous, broken, dangerous, and in great decay for want of needful and necessary upholding, maintaining, amending, and repairing the same, and the said common and public bridge, during all the time last mentioned, was, and yet is too *narrow, so that the subjects of the King, in, upon, and over the said bridge on foot, and with horses, coaches, carts, and carriages, could not and cannot pass and repass, ride and travel without great danger of their lives and the loss of their goods as they ought to do, but were, and yet are, greatly obstructed, stopped, and hindered in the going, returning and passing, riding and travelling, upon and over the same common public bridge, and during all the time aforesaid, were, and yet are, in great peril, hazard, and danger of being overturned in the said carts, coaches, and carriages, and of being killed owing to the narrowness of the same, to the great damage and common nuisance of all the subjects of the King upon and over the said bridge on foot, and with their horses, coaches, carts, and other carriages, about their necessary affairs and business, going, returning, passing, riding, and travelling, against the form of the statute in that case made and provided, and against the peace, &c.; and that the inhabitants of the county of Devon of right have been, and still of right are bound to repair and amend the same common bridge, so as aforesaid being broken, ruinous, too narrow, and in decay, and to make the same safe and secure for the said subjects when and so often as it becomes necessary." Plea, not guilty. The jury found a special verdict stating the following facts.

The bridge called Dart bridge in the indictment mentioned, on the 10th of February in the 4th year of Geo. IV., was, and from thence hitherto hath been, a common and public bridge for all the liege subjects of the King on foot and on horseback, and with their horses, coaches, carts, and carriages upon and over the

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same bridge, to go, return, pass, ride, and travel at their free will and *pleasure, freely and safely without any obstruction, hindrance, or impediment whatsoever. The said common and public bridge, on the day and year last aforesaid, and continually afterwards, until the day of taking the inquisition, was not ruinous, broken, dangerous, and in great decay, for want of necessary upholding, maintaining, amending, and repairing the same. But it was on the day and year last aforesaid, and continually afterwards, until the day of taking the inquisition, and still is too narrow, so that the liege subjects of our lord the King, in, upon, and over the same bridge on foot, and with horses, coaches, carts, and carriages, could not, and cannot pass and repass, ride and travel without great danger of their lives and the loss of their goods, as they ought to do, but were, and yet are, greatly obstructed in going, returning, and passing, riding, and travelling over the same common public bridge; and during all the time aforesaid were, and yet are, in great peril, hazard, and danger of being overturned in the said carts, coaches, and carriages, and of being killed owing to the narrowness of the bridge; but the bridge, on, &c., and during all the time aforesaid, was, and still is, as wide as it ever was, and the inhabitants of the said county of Devon of right have been, and still of right are bound, to repair and amend the said common public bridge.

P. Williams, for the Crown :

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The question is whether the inhabitants of a county who at common law are bound to repair a bridge are not also bound to widen it, whenever the public convenience requires that it should be made wider. It certainly never has been decided that the inhabitants of a county are bound to *widen an ancient bridge; but in *Rex v. The Inhabitants of Cumberland*,† Lord KENYON says that the Court, in a former stage of that cause, had intimated a strong opinion, “that if a bridge used for carriages, though formerly adequate to the purposes intended, were not now of sufficient width to meet the public exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair the bridge.

† 3 R. B. 149 (6 T. R. 194).

And upon that question there cannot be entertained much doubt." That case afterwards came before the House of Lords upon writ of error,† when Lord ELDON expressed doubts upon this question, and the case was ultimately decided upon another ground. The question to be considered now is, whether the inhabitants are not bound to widen a bridge, for the same reason that they are bound to repair it. Lord Coke, in his comment upon the Statute of Bridges, in 2 Inst. 700, says, "That at common law individuals or corporations are bound to repair bridges, by reason of their tenure or prescription; but that if none were bound to the reparation of the bridge by the common law, the whole county, that is, the inhabitants of the county or shire wherein the bridge is, shall repair the same; for of common right the whole county must repair it, because it is for the common good and ease of the whole county. Also if a man make a bridge for the common good of all the subjects, he is not bound to repair it." And in 13 Co. Rep. 33, "A bridge shall be levied by the whole county, because it is a common easement for the whole county," which is taken from the 10 Edw. III. 20 b. And in Dalton's Just. c. 16, p. 58, a stronger expression is used; "By common right bridges shall be **amended* by the whole county, for it is for their common good and ease." It should appear, therefore, that the county was made liable against its will, and for what purpose? For the ease and benefit of the whole county. A purpose clearly entitled to receive a favourable and reasonable interpretation. The reason, therefore, why the inhabitants of a county are bound to repair a bridge, being that it is for the common benefit of the whole county; it would seem to follow, that where it is for the common benefit of a county that a bridge should be widened, the inhabitants of a county should be at the expense of widening it. The common law obligation to repair bridges may be traced to the earliest times. *Pontis reparatio, arcis constructio, expeditio contra hostem*, constituted the *trinoda necessitas*, to which all lands in Saxon times were subject. These three objects are correlative and dependent on each other, and if the *pontis reparatio* did not include a sufficient widening, the *expeditio contra hostem* might

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† *Inhabitants of Cumberland v. Rex*, 7 R. B. 792 (3 Bos. & P. 354).

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be altogether defeated. Suppose that in those times, in consequence of a bridge being too narrow, the monarch could not pass with his waggons and military stores, would it have been permitted to the persons liable to repair, to say that the bridge was fit for the species of carriage which was in use 100 years before? The answer would have been, that they were bound to keep the bridge fit for those purposes for which the public required it from time to time. That is the construction which reason, fortified by power, would put upon the obligation to repair bridges, and that construction would secure the rights of the Crown, and the convenience of the community. In the confirmation of magna charta by Henry III. c. 15, it is declared, “Nulla villa, nec liber homo distringatur, facere pontes aut riparias nisi qui ab antiquo et de jure, *facere consueverunt tempore Henrici regis avi nostri.” At that time the obligation rested where custom or prescription had fixed it, and it was intended to prevent the monarch from ordering a new bridge to be built on a new site altogether. The term “*facere*” cannot well mean any thing less than repair; and the fair construction is, that no person shall be called upon to do any thing to a bridge which he was not anciently bound to do, the object of that clause being to impose a restraint on the Crown. Thus the Statute of Bridges has always received a liberal construction, as being a statute declaratory of the common law; and although the common law rule be, that the inhabitants are liable to repair, yet still that rule ought to be liberally construed with reference to the beneficial purpose for which it was intended, and so as to lead to a fair distribution of the burden of repairing among the public. And giving it a liberal interpretation, it may be considered as throwing upon the inhabitants of the county the obligation of rendering the bridge reasonably fit for ordinary purposes. The word *reparatio* is equivalent to *re-edificatio*, and, construed liberally, is sufficient to import the widening of a bridge already built. A road which might be in perfect repair for waggons and other carriages two centuries ago, but not fit for a mail coach in the present day, would clearly be indictable. It is to be observed also in this particular case, that the bridge is alleged to be for all carriages, &c.; and that the

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King's subjects cannot pass and repass in their carts and carriages; and unless it is the unreasonable doctrine of the English law, that it is never to accommodate itself to circumstances, those carriages and vehicles must be intended which are in ordinary and necessary use. As this allegation is not traversed, the fact is found by the verdict, that the King *and his subjects cannot safely pass and repass "in carts and carriages," &c.; and then the county is answerable for the consequences, without referring to the cause of the interruption, whether it arose through want of repair, or the narrowness of the road; inasmuch as the bridge is not in a sufficient state for those purposes for which the obligation of the law has been imposed upon counties.

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Tancred, contrà, was stopped by the Court.

ABBOTT, Ch. J. :

The question in this case is by no means new to the mind of the Court, for the same was raised in a case which lately came before us from the county of Lincoln,[†] and we then expressed a very strong opinion, that a county could not be compelled to make a bridge wider than it had formerly been. The point to be considered is, what extent of charge can by law be cast upon the inhabitants of a county, and not merely the nature of the bridge which the convenience of the public requires. This case has been argued with great learning and ability, but not one single authority (with the exception of a *dictum* of Lord KENYON) has been cited, to shew that a county may be compelled even to make an ancient bridge wider than it was before. There are many bridges in this country, which were formerly wide enough for the little traffic which then existed, but which are now inconvenient and too narrow, with reference to the increased traffic, which takes place in modern times; yet there has been no instance in which the inhabitants of a county have been compelled to accommodate the bridge to that increased traffic by

[†] *Rez v. Inhabitants of Lincoln*, new trial was granted in E. T. 5 Geo. IV.; but it had not been disposed of [at the date of the report].

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*widening it, that is, by adding to the bridge something which did not exist before. And if we should lay down the law to be, that the inhabitants of a county may be compelled to widen a bridge, I am utterly unable to see why we should not be called upon to say, that the inhabitants of a parish are bound to widen a public high-road; and the inconvenience arising from such a rule is obvious. The inhabitants of a parish as such have no power, except by Act of Parliament, to purchase at their own expense, land for the purpose of widening a road; and if they could be compelled to buy land for such a purpose, I do not see why they should not also be compelled to buy houses, and then the inhabitants of the parish of Saint Andrew, Holborn, might be compelled to purchase and pull down the houses on one side of the north end of Chancery Lane, and so make the road wide enough for two carriages to pass, which they cannot do at present. In the absence of all authority, except the *dictum* of Lord KENYON, I think it is not in the power of this Court to say that the inhabitants of a county or parish are liable to greater burdens than have hitherto been cast upon them, and, therefore, I think that the inhabitants of Devonshire are not bound to widen this bridge. If public convenience requires that it should be done, that object must be affected by a higher authority than that of this Court.

BAYLEY, J. :

If there be any analogy between the obligation of a parish to repair a road, and that of a county to repair a bridge, the case of *The Queen v. The Inhabitants of Stretford*,† is an authority to shew that *the inhabitants of a county are not liable to widen a bridge. The indictment there was, that the road was so muddy and narrow, that the Queen's subjects could not pass along it without danger of their lives, and that the inhabitants had time out of mind repaired it, and ought to repair it as often as need was. After a verdict and judgment for the Crown, a writ of error was brought, and the exception taken was, that the time at which the way was laid to be muddy was the 11th of January, which was in winter, and that it was

† 2 Ld. Ray. 1169.

no offence for the highways to be dirty in winter ; and, secondly, that the allegation that the way was so narrow that the Queen's subjects could not pass, furnished no ground for an indictment against the parish, because the parish had not by law the means of widening it, for they had no right to take adjoining land in order to widen the road ; and the indictment was held bad for want of saying that the way was out of repair. And POWELL, J. said, "that the saying that it was so narrow that the Queen's subjects could not pass, was repugnant to its being a King's highway, for if it had been so narrow, people could not have passed there time out of mind." When a road is originally made, it may so happen that the proprietor of the land over which the road passes, which he dedicates to the use of the public, has nothing on the one side or the other, and if the public take to it, they take to it subject to the inconveniences to which that slip of land is liable ; and the parish, under such circumstances, can have no power to widen the road. The analogy, however, between a road and a bridge, is not perfect ; and it does not necessarily follow, that although a parish has not the power of taking the adjoining land, a county may not have the power of widening a bridge. Independently, however, of that case, I am of opinion, that circumstanced as this bridge is, there is no obligation on the county to widen it. Is a county bound to make a bridge, where there was none before ? There is no authority for saying that it is so bound, and the passage cited from Magna Charta shews that the inhabitants of a county are under no obligation to *make* a bridge ; and there is no instance of an indictment against the inhabitants of a county for not making a bridge. The obligation of the inhabitants of a county to repair a bridge, arises out of the adoption of that bridge by the public, with the concurrence of the inhabitants of the county. Where a bridge is built by an individual, with high roads at each end of it, and the public use the bridge, and the inhabitants of the county suffer it to be used as a public bridge, the latter thereby incur an obligation to keep the bridge in the state in which it was when dedicated to and used by the public, but they do not thereby incur any obligation to make it different from what it then was. Now in this case it is stated, that in the

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fourth year of the reign of his present Majesty this bridge existed. It is not stated in the special verdict, whether it was ever passable before that time or not. It is stated that the bridge is so narrow that the King's subjects cannot pass without danger of their lives and loss of goods; but the public thought fit to take to it in the state in which it was originally given to them, and having so taken to it in that state, I think that the law does not throw any obligation on the inhabitants of the county, to alter it. For these reasons I am of opinion, that as a county is not bound to make a bridge, it is not bound to widen one: *Quoad* the addition, that would be a making; because the addition beyond the existing width, would be *pro tanto* a new bridge. I am, therefore, *of opinion, that there must be judgment for the defendants.

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LITLEDALE, J. :†

I am of opinion that by the common law a county is only bound to repair actually existing common and public bridges. If the inhabitants of a county were bound to widen a bridge merely because the public convenience required that it should be widened, it might be said, that where the public convenience requires a bridge to be made where there was none before, the inhabitants of a county would be bound to make one. For there is just as much reason to call upon them to make a new bridge where there was none before, as to widen an existing bridge. It is quite clear, that by the common law there is no obligation on the inhabitants of a county to make a bridge where there was none before; and it appears to me, therefore, that they are not compellable to widen a bridge. If the public convenience requires that bridges should be made, they must be made by the authority of the Legislature; and so if it requires bridges to be enlarged, that also must be done by the same authority. If at common law the inhabitants of a county were obliged to widen a bridge, they must have had the means of doing it, and in order to widen a bridge, they must have had the means of purchasing land upon which the ends of the bridge must rest, and also to purchase the interest of persons who might have

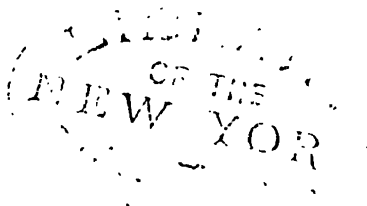
† Holroyd, J., was absent in the Bail Court.

fisheries, and whose rights would be interfered with, by extending the pillars and abutments of the bridge. Now by the common law the inhabitants of a county have no right to expend the public money in purchasing the land necessary for these *purposes. In some cases it might possibly become necessary in order to widen a bridge, to take down buildings at either end of a bridge, because the width at the ends must be increased. But I apprehend that by the common law the county has no right so to expend the public money, and most certainly there is no obligation on any person to sell his land or houses. Then if the county has not the means of widening a bridge, it affords a strong presumption, that they are not bound to do it. By statute 48 Geo. III. c. 59, the inhabitants of a county may, for the purpose of widening a bridge, compel the sale of land, and by 54 Geo. III. c. 90, of any buildings, but at common law they had no such power. Upon the whole, I am of opinion that there is no obligation at common law on a county to widen a bridge, and consequently there must in this case be judgment for the defendants.

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Judgment for the defendants.



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THE KING *v.* JOHN JARAM.

(4 Barn. & Cress. 692—704 ; S. C. 7 Dowl. & Ry. 163.)

By letters patent reciting that the liberty of H. was an ancient liberty, and that the lords were bailiffs of the same, and had exercised returns and executions of writs and processess within the liberty, the King granted to A. B. his heirs and assigns, that he should have within the liberty of H. the return and execution of all writs, processess, and precepts of his Majesty, by the lords' proper bailiffs, officers, and ministers, so that no sheriff of the King, his heirs or successors, should enter into the liberty to execute any thing, unless it touched his Majesty or his Crown, or in default of the lords' bailiffs and officers. The bailiffs of the liberty had regularly attended the Quarter Sessions, and made returns of the jurors resident within the liberty: Held, that the bailiff of the liberty was bound in obedience to the precept of the sheriff, to summon the jury within the liberty, to attend the Quarter Sessions.

The Court of Quarter Sessions made an order, that A. B. the acting bailiff of the lordship of H. be fined 10*l.* for refusing contrary to the duty of his office, and to ancient usage, to summon the jury from the lordship to attend at the Quarter Sessions, he the said A. B. having been duly required so to do by warrant from the sheriff: Held, that this order was good, although it did not appear that the bailiff was summoned to attend at the Sessions, it being his duty to do so without summons.

A RULE *nisi* had been obtained for quashing the following order, made by the justices of the peace for the East Riding of the county of York, at their general Quarter Sessions, held on the 11th of January, 1825: "Ordered, that John Jaram, the acting bailiff of the seigniory or wapentake of Holderness, in the East Riding of the county of York, be fined 10*l.* for refusing, contrary to the duty of his office, and to ancient usage, to summon the jury, from the said seigniory or wapentake, to attend at the general Quarter Sessions of the peace, held at Beverley, for the said Riding, on the 11th day of January, 1825, he, the said John Jaram, having been duly required so to do by warrant from the sheriff of Yorkshire, dated the 30th day of December, 1825."

The affidavits in support of the rule stated the following facts: Sir T. A. Clifford Constable, of Burton Constable, in Holderness, baronet, by virtue of several letters patent under the Great Seal of England, was seised and possessed of the seigniory or lordship of Holderness, in the county of York, together with the jurisdictions belonging to the same seigniory or lordship. By the last letters

patent of the 31st day of December, in the *16th Charles II., after reciting, amongst other things, certain former letters patent, granted by King Philip and Queen Mary to Henry Earl of Westmoreland, and by King Charles I. to Henry Constable Viscount Dunbar, and that the liberty of Holderness was an ancient liberty, and that the lords thereof were bailiffs of the same liberty, and had and exercised returns and executions of writs and processes within the same liberty, and other rights and franchises therein, King Charles II. did, among other things, give and grant to John Viscount Dunbar, his heirs and assigns, that he and they should have, "within the said liberty of Holderness, the return and execution of all and singular writs, processes, mandates, warrants, and precepts of his said Majesty, his heirs and successors, by the proper bailiffs, officers, and ministers of the said John Viscount Dunbar, his heirs and assigns from time to time, there to be returned, done, and executed; so that no sheriff of his Majesty, his heirs or successors, should enter into the liberty of Holderness, or into any town, village, leet, or hamlet, within the whole wapentake or hundred of Holderness, to do or execute any thing belonging to his office, unless it touched his said Majesty or his Crown, and unless upon the default of the bailiffs and officers of the said Viscount Dunbar, his heirs or assigns, with the special writ of *non omittas* in that behalf first had and obtained. And the King thereby, for himself, his heirs and successors, did finally enjoin and command his sheriff, and the sheriff of his heirs and successors of the county of York for the time being, and every of them, upon all and singular writs, processes, mandates, warrants, and precepts delivered, or to be delivered into their hands for ever thereafter, for any execution thereon to be made or done within the *said liberty of Holderness, or within any town, village, leet, or hamlet within the whole wapentake and hundred of Holderness, immediately and without delay after the receipt of every such writ, process, mandate, warrant, or precept, to make his and their mandates, warrants, or precepts thereupon, and to direct the same to the bailiffs, officers, and ministers of the said Viscount Dunbar, his heirs and assigns of his liberty aforesaid for the time present then being, and to no other person or persons

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whatsoever, and to command the due execution thereof to be made by the aforesaid bailiffs, officers, and ministers of the said Viscount Dunbar, his heirs and assigns, from time to time as aforesaid, unless it touched his said Majesty or his Crown, and unless upon default and with the special writ of *non omittas* as aforesaid." It further appeared, that one Iveson executed the office of deputy-chief bailiff of the said seigniori or lordship of Holderness, and the defendant Jaram, that of under-acting bailiff of the said seigniori or lordship; and that he, Iveson, had been advised that, according to the true construction of the letters patent, the return and execution of writs and process so given and granted by the letters patent was confined to civil process; and that he, the chief bailiff, thought it proper, for the rights and interests of Sir T. A. Clifford Constable, to order the defendant Jaram no longer to execute the precepts of the sheriff to summon jurors within the said liberty of Holderness, to the intent and purpose that the question might be fairly tried between Sir T. A. Clifford Constable and the sheriff, whether the bailiffs of Sir T. A. Clifford Constable were bound to obey and execute such precepts of the sheriff; that at the Quarter Sessions of the peace for the said East Riding, on the 11th of

[*695] *January last, a complaint was made to the magistrates there assembled by the under sheriff for the East Riding, against Jaram, for disobedience to the precept of the sheriff, which had been previous to the said Sessions directed to him, Jaram, to summon jurors from the liberty of Holderness, to attend at the same Sessions; and it was at the same time urged by the under sheriff, that a fine should be imposed by the magistrates upon Jaram for such disobedience; that the chief bailiff, on the part of Jaram, contended before the magistrates that Jaram had not disobeyed any order of the Court, and that it was not, therefore, competent for the Court to fine him as no contempt had been committed. But the Court, nevertheless, made the order in question. It appeared by the affidavit of the deputy clerk of the peace for the East Riding, that since 1787, when he was appointed to that office, the bailiffs appointed by the high sheriff of the county for the time being, as well as the bailiffs appointed by the Bishop of Durham in right of his see for the wapentake

or liberty of Howdenshire, and by Sir T. A. Clifford Constable, Baronet, and his ancestors, for the wapentake or liberty of Holderness, both in the said Riding, had, during the time that he had been deputy clerk of the peace as aforesaid, regularly attended the General Quarter Sessions, making returns of the jurors resident and summoned within their respective divisions, and remaining in Court in their character as officers of the Court during all the time the Sessions were held, which usually continued two days or more, until the Epiphany General Quarter Sessions in the year 1823, when John Jaram was fined the sum of 5*l.* for being absent without leave of the Court. The affidavit further stated, that in the North Riding there *were several bailiffs appointed by lords of liberties independent of the high sheriff of the county; and that such bailiffs attended the General Quarter Sessions for that Riding, in the same manner and for the same time as the bailiffs who were appointed by the high sheriff.

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Coltman shewed cause :

[He referred to the statute *27 Hen. VIII. c. 24, s. 7, by which it is enacted] that “all stewards, bailiffs, and other ministers of any liberties or franchises which *in times past* have used or ought to attend upon the justices of assize, justices of gaol delivery, and justices of the peace at large in any county, shall be attendant to the justices, &c. of the same shires wherein such liberties and franchises be, and make due execution of all process to them to be directed, for ministration of justice within such liberties or franchises; and that also all such bailiffs or their deputies or deputy, shall give their attendance and assistance upon the sheriff, together with the sheriff’s bailiffs, at all courts of gaol delivery, from time to time, for execution of prisoners according to justice.”

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J. Williams and *Deacon*, *contra*. * * *

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BAYLEY, J. :

I am of opinion that upon the true construction of this charter and of the statute of Hen. VIII., the bailiff of this liberty was bound to execute process of this description, and that his duty in

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that respect is not confined to the execution of civil process. By the charter the lords of the liberty were to have the return of all writs, processes, &c., by their proper bailiffs, so that no sheriff should enter the liberty, unless it touched his Majesty, or his Crown, or on default of the bailiff of the liberty. A general power was, therefore, granted to the lord of the liberty to execute process within the liberty by his bailiffs. Then by the statute of Hen. VIII. all bailiffs of liberties, &c., who *in times past* have used or ought to attend upon the justices therein mentioned, and, among others, justices of the peace, shall attend upon the same justices, and make due execution of all process to them to be directed for ministration of justice within the liberties. That statute, therefore, recognizes the liability of bailiffs of liberties, who by ancient usage had been accustomed to do certain duties before that Act. I agree that this statute applies to those officers only who in times past had been used to attend upon the justices of assize, &c. The charter recites, that the liberty was an ancient liberty, and that the lords were bailiffs, and had and exercised returns of writs, &c.; the presumption [*704] *therefore is, that it was a franchise existing at the time of the passing of the statute of Hen. VIII., there being no evidence to the contrary. It appears by the passage cited from Hawkins† that the usual practice is for the sheriff to command the bailiff to execute the process within the liberty. That being so, I think the Court of Quarter Sessions may at their option proceed either against the sheriff or the bailiff. I do not enter into the question of form; but for these reasons I think the rule for quashing the order of sessions must be discharged.

LITLEDAL, J. concurred.‡

Rule discharged.

† 2 Hawk. P. C. ch. 8, s. 60.

‡ Holroyd, J. was in the Bail Court.

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(4 Barn. & Cress. 715—731; S. C. 7 Dowl. & Ry. 201; 4 L. J. K. B. 29.)

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A., being agent for the grantor and the grantee of an annuity, delivered an account to the grantee, by which it appeared that he, the agent, had received certain payments on account of the annuity; these payments, in fact, had not been received: Held, that the agent was bound by the account which he had delivered, unless he could shew that he had given credit for those payments by mistake.

If a party who owes money to another on two different accounts, makes a payment generally, the party receiving it may apply it to either. It is not necessary, however, that the person paying the money should declare the appropriation of it at the time of payment: it is sufficient, if it can be collected from other circumstances, that he intended at the time of payment to appropriate it to one account specifically. And, therefore, where A. having large demands against B., upon bill transactions with himself, and also as agent for several persons to whom B. had granted annuities secured by C., caused an attorney to make application to B. and C. on behalf of these annuitants, and B., in consequence of that application and the remonstrances of C., the surety, paid to A. certain sums of money, without making any express appropriation of them at the time of payment: Held, that A. must be considered as having received them on account of the annuitants, and that the latter were entitled to have those monies divided amongst them, in proportion to the amount of their respective demands.

ASSUMPSIT for work and labour, money lent, &c., and upon an account stated, before the bankruptcy, money had and received, and account stated with the assignees since the bankruptcy. Plea, general issue. At the trial before Abbott, Ch. J., at the London sittings after Hilary Term, 1825, a verdict was found for the plaintiffs, damages 3,500*l.*, subject to a reference of all matters in difference in the cause to Mr. Justice Gaselee, then at the Bar, who, at the request of either party was to state on the face of his award any point of law which he might think expedient. The reference not having been completed during Mr. Justice Gaselee's continuance at the Bar, it was suggested by him, and agreed to by the parties (subject to the approbation of the Court) that he should state the facts in the shape of a special case, for the opinion of the Court, which he did as follows.

The bankrupt, Howard, for many years before, and until the month of January, 1814, and the two bankrupts (who then became partners) from thence to the death of the late General

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Sir Thomas Picton, which *happened on the 18th of June, 1815, were employed by the General to purchase annuities for him, and they were in the habit of receiving the annuities, for which they charged him a commission of two and a half per cent., and they in general acted in those and other matters as his bankers. From the death of the General, who made his brother, the defendant, his sole executor and residuary legatee, the bankrupts continued to receive the annuities for the defendant, for which they made the same charge of commission. The act of bankruptcy was committed on the 6th of February, 1821, and the commission was dated the 21st of August in the same year. The bankrupts were in the habit of acting as agents for many other grantees of annuities, and also for some of the grantors, and their usual course was, in their own books, to enter on the credit side of the accounts of the grantees, and on the debit side of the accounts of the respective grantors, the instalments of the annuities, from time to time, as they thought fit, but not always at the precise periods when they became payable. There was no new account opened, or even any rest made in the account, on the commencement of the partnership between Howard and Gibbs, or on the death of General Picton; but the account was carried on regularly from the commencement in the bankrupt's ledger, with balances from time to time struck as the bankrupts thought proper. The defendant had a pass-book, which from time to time as he came to town, was left with the bankrupts, to be filled up with the several entries made in the ledger since the period at which it had been last left with them. The pass-book was not, however, a fac-simile of the ledger, inasmuch as it did not state the balances made from time to time in the ledger, but in it the balances *were struck at the times of making up the pass-book. No accounts were settled between them, except by such making up the pass-book, and returning it with the balances struck therein, as above stated.

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In the year 1820, amongst other annuities held by the defendant, were an annuity of 80*l.* for three lives, granted in February, 1809, to the late General Picton by William Rowley, and secured by an assignment of certain leaseholds to the bankrupt, Howard, and an annuity of 1,075*l.*, granted to defendant by Lord

Alvanley, and guaranteed by Lord Foley, upon their joint personal security.

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This action was brought to recover the sum of 2,992*l.*, being an alleged balance of monies advanced by the bankrupts, to or on the account of the defendant, a part of such balance, arising upon the account stated in the pass-book, by withdrawing from the credit side thereof several sums of money hereinafter specified, in respect of Rowley's and Lord Alvanley's annuities, which had been entered (without being received) with certain sums for interest.

In respect of Rowley's annuity, 361*l.* 11*s.* 3*d.*, being the excess of the several instalments of that annuity, entered on the credit side of the account, beyond the amount of the rents of the leasehold premises received by Howard and Gibbs respectively, after deducting the outgoings.

In respect of Lord Alvanley's annuity, 1,075*l.*, the amount of a year's annuity, due 6th December, 1819, and entered on the credit side of the account, under date of the 2nd March, 1820, and 268*l.* 15*s.*, the amount of a quarter, due 6th March, 1820, entered on the credit side, under date of the 8th June, 1820.

In respect of interest, 204*l.*, interest on a bill for 1,000*l.*, dated 19th February, 1820, drawn by the defendant on Gibbs, and paid 15th May, 1820, and 89*l.* 18*s.* 7½*d.*, interest on a bill for 500*l.*, drawn by defendant on Gibbs, dated 2nd September, 1820, and paid 9th November, 1820. This interest is calculated to 15th June, 1824. The plaintiffs made other claims, but upon an investigation of the account, independently of these sums, the arbitrator found the balance to be 126*l.* 15*s.* 9*d.* in favour of the defendant; and, therefore, if the plaintiffs were not entitled to strike out of the defendant's credit, or to recover any of the above sums, or if any not exceeding the said sum of 126*l.* 15*s.* 9*d.*, the defendant was entitled to the verdict.

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With respect to those sums the facts were these. As to Rowley's annuity. By the deed granting that annuity, dated 4th February, 1809, certain leasehold premises, held by Rowley, at rents amounting to 70*l.*, were assigned to the bankrupt, Howard (a trustee named by General Picton, and who in the transaction was his agent only, and not the agent of Rowley) in

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trust for securing the payment of the annuities in case of arrear, by sale or otherwise, and after the death of the persons for whose lives the annuity was granted, and payment of all arrears of the annuity, in trust, as to such part of the premises as should not have been sold, and the residue of the produce of such part as should have been sold, for Rowley, his executors, &c., and to be assigned, transferred, and disposed of, as he or they should direct.

[*719] In March, 1811, Rowley became bankrupt, and Howard entered into the receipt of the rents of the premises from that time ; and he, before the partnership, and *he and Gibbs since the partnership, continued to receive the rents up to, and even beyond the time of their bankruptcy. The course, however, which they uniformly adopted in keeping their account with the Pictons, in their (the bankrupts) own books, and also in the pass-book, was not to enter on the credit side of the account the amount of the rents received, and the outgoings on the debit side, but to enter, on the credit side, the instalments of the annuity, and on the debit side to enter a charge of two and a half per cent. commission on each instalment. But a distinct account of the rents and outgoings was entered in the bankrupt's books under the name of William Rowley, stating on the credit side the rents received, and on the debit side the outgoings and the annuity from time to time credited to the Pictons. Of this account there was no evidence that the Pictons had any notice.

The state of their actual receipts and payments in this last account was as follows. The receipts during the life of the General were 872*l.* ; since his death 801*l.* The disbursements during his life, including five years' ground rent, were 526*l.* ; since his death 332*l.* ; so that the receipts in the whole exceeded the disbursements by 315*l.* ; and that sum only was applicable to the discharge of the annuity. The instalments entered on the credit side of the account in the General's lifetime were 324*l.*, and since his death 352*l.*, making in the whole 676*l.*, leaving an excess of 363*l.* above the sum actually received by the bankrupts.

As to the 1,075*l.* and 268*l.* 15*s.* on account of Lord Alvanley's annuity, the facts were these : the 1,075*l.* for a year's annuity

having become due on 6th December, 1819, the defendant, in January, 1820, wrote to the bankrupt, Gibbs, to enquire whether the arrears had been paid, *and stated that he wished to draw for the money. In answer to that letter Gibbs, on the 5th February, 1820, sent him an account of the several receipts and payments since the pass-book had been last made up. In that account credit was given to the defendant for 1,075*l.*, a year's annuity, due from Lord Alvanley, December 6th, 1819; Gibbs at the same time informed the defendant that it had not been received, but that when it was the balance in his (defendant's) favour would be 1,045*l.* On 15th December, Gibbs wrote to the defendant, and stated that he would honour his draft at seventy days' sight, but that he, Gibbs, had not received the money. On the 19th of February the defendant drew on Gibbs, at that date, for 1,000*l.* On the 19th or 20th of May, the pass-book, not having been made up since May, 1819, was left with the bankrupts for that purpose, and the balance was then stated to be 748*l.* 9*s.* 5*d.* in favour of the defendant, which he drew for by a bill, which was afterwards paid on the 30th June, 1820. The pass-book was soon afterwards returned to the defendant, with an entry, that 1,075*l.*, Lord Alvanley's one year's annuity, due the 6th December, 1819, was not then received. On the debit side of the account the defendant was charged with the bill for 1,000*l.*, as paid on the 15th May, 1820.

Besides the annuity granted to the defendant, Lord Alvanley had granted several others to persons for whom the bankrupts were agents, and Lord Foley was surety for the payment of them all. The bankrupts had also large bill transactions with Lord Alvanley, and on the 24th October, 1820, Lord Alvanley was indebted to them in a sum of 30,691*l.* on the bill account. On the 31st October, 1820, the bankrupts instructed an attorney to write to Lord Alvanley and Lord Foley, on *behalf of six several annuitants, to whom the arrears then due amounted to about 9,000*l.*, (of which 1,881*l.* was due to the defendant on the 6th September, 1820,) and to write as if employed by the annuitants, and not by them, H. and G. The attorney accordingly did write to them upon two different occasions, and on the 4th or 5th November was informed by Gibbs that he had received

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several sums of money from Lord Alvanley on account. On the 6th November the attorney had an interview with Lord Foley and Lord Alvanley together, and pressed them for further sums. Lord Foley appeared much hurt at being pressed, being only a surety. Lord Alvanley promised to provide a considerable sum of money, and on the following day he went with Gibbs to the chambers of the attorney, and said he was not fully prepared, but threw down bank notes amounting to 2,800*l*. The attorney declined to receive the money, saying "Gibbs is the agent of these gentlemen to receive the money." Lord Alvanley then paid the money to Gibbs, and promised to pay more in a few days; and the sums actually paid to the bankrupts by Lord Alvanley between the 1st and the 10th of November, amounted to 7,146*l*. Between the 27th of October and the 10th of November bills to the amount of 9,500*l*., accepted by the bankrupts for Lord Alvanley, and for which he was to provide, became due. Gibbs applied the 7,146*l*. paid by Lord Alvanley between the 1st and 10th November, in discharge of the bill account. The bankrupts, also, between the 30th October and the 10th November had paid, on account of Lord Alvanley, bills accepted by him to the amount of 10,500*l*., and during the same period he drew bills upon them to the amount of 7,000*l*., all of which were afterwards paid. On the 25th of November, 1820, the bankrupts wrote to Lord Alvanley, and enclosed *him a statement of an account, by which it appeared that he was indebted to them upwards of 40,000*l*., and they added that that was besides and independent of all his, Lord Alvanley's, annuities, due since December, 1818. On the same day Lord Alvanley, by letter, acknowledged the account to be correct, and stated that he was aware that the sums so advanced were independent of the arrears of the annuities since December, 1818. If the sum of 7,146*l*. was not to be considered as appropriated to the annuitants, for whom the attorney wrote, the bankrupts had paid to the defendant more than they had received on his account, and upon that sum they claimed interest from the time when it was advanced.

Hill, for the plaintiffs :

The assignees of Howard and Gibbs are entitled to recover

back the sum of 1,849*l.* which the bankrupts advanced to the defendant on account of the annuity granted by Lord Alvanley; for the defendant had notice from Howard and Gibbs, that they had not received the money at the time of the advance. That sum, therefore, is money advanced, and not a payment made by them to their principals; therefore, as to that part of the case, the doctrine applicable to accounts rendered by agents to their principals, does not apply. It will be contended, that it must be inferred from the facts stated in this case, that the money paid by Lord Alvanley, after he had been pressed by the attorney, ought to be applied in discharge of the annuities then due from him; but as Lord Alvanley did not expressly appropriate the money at the time of payment, it was competent to Howard and Gibbs to apply it to the bill account, and they did so. Afterwards, in a letter to Howard and Gibbs, Lord Alvanley *admitted the propriety of that application; and that is an express acknowledgment by him that he had appropriated all the payments to the bill account. But, assuming that the 7,146*l.* was paid upon account of the annuities, the precise amount of them is not ascertained; how, then, can the Court apportion that sum among the different annuitants? Besides, some of the annuities may have been in arrear for a longer period than others, and in that case the sums paid ought to be appropriated in the first instance to discharge the oldest debt. Then, as to Rowley's annuity, the money was advanced by Howard, as trustee of the estate on which it had been secured. He paid more than the produce of that estate, and the grantor having become bankrupt before the trustee entered into the receipt of the profits of the estate, the defendant was no loser by not having the opportunity of applying to him personally.

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ABBOTT, Ch. J. :

We are all of opinion that the plaintiff cannot substantiate any claim for interest. The general rule is, that interest is not due by law for money lent, unless from the usage of trade or the dealings between the parties, a contract for interest is to be implied. Here no such contract is to be implied, for there is no usage of trade; and it does not appear by the case that any

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interest had ever been brought into the account on either side; and there is an additional reason in this case, why the plaintiffs should not be allowed to charge interest upon the sum of 1,000*l.*, because it is manifest that Howard and Gibbs allowed the defendant to draw for that sum, in order to keep him quiet, and prevent him from urging his claim upon Lord Alvanley. The advance, therefore, was made to *answer their own purposes; and we are clearly of opinion, that that claim cannot be sustained.

With respect to Rowley's annuity, if this was the case of a man giving credit by mistake, the mistake might, no doubt, be corrected, and the money paid in consequence of that mistake, might be recovered back, but that is not the present case. Howard and Gibbs with their eyes open, and knowing (as we must suppose) how much they had actually received out of the leasehold estate, and how much was applicable to the payment of that annuity, think fit from time to time, for a long period, to give credit to the General in his lifetime, and after his death to the defendant, for the whole of this money, as money received on their account. It was evidently important for Howard and Gibbs, with reference to the system on which they were then conducting their business, to make their customers believe that the annuities were duly paid; and they having thought fit to give credit for these sums to the grantees of these annuities, and induced them to treat them as money for which they had a right to draw, we think it would be most unjust to allow Howard and Gibbs (if they had not become bankrupts) or their assignees, who stand in the same situation, to say at last, that the grantees must refund all this money. We, therefore, think that the plaintiffs cannot recover back the sums which the bankrupts have paid to the defendant and his brother on account of that annuity.

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The remaining point is as to Lord Alvanley's annuities. It appears that several sums of money were received by Howard and Gibbs, after their attorney had written a letter, addressed not merely to Lord Alvanley but to Lord Foley. The latter, therefore, may have a *right to insist that the money was paid in pursuance of that letter, and should be applied in discharge

of those annuities for which he had become surety. The counsel for the defendant will, therefore, direct his attention to the question, whether any and what money was received by Howard and Gibbs in consequence of the attorney's application, made according to their instructions, and how that sum is to be apportioned.

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Evans, for the defendant :

Howard and Gibbs were agents both for the grantors and the grantees of these annuities, and if a party who is an agent for such persons, chooses to debit one and credit the other in account, and communicates to his principals that he has so done, he, the agent, must be bound by that act. In *Williamson v. Gould*, and *Carroll v. Gould*,† Howard and Gibbs paid the amount of the instalments without having received them, and charged their commission upon the same, and those were held to be voluntary payments on account of the annuities, and if so, they could not be recovered back when paid. The distinction between those cases and the present is, that here the bankrupts informed the grantee of the annuity, that they had not received the instalments, but they said they expected to receive them immediately, and they allowed him to draw for 1,000*l.*; they ought to have communicated to the defendant afterwards, that they had not received the money, but they concealed this fact to answer their own purposes, and thereby became liable themselves; they were, therefore, guilty of negligence, and having induced the defendant to treat the *money received on the bill as his own, they cannot now recover it back as if it had been a loan. In *Edgar v. Bumstead*,‡ an insurance broker, after a loss had happened upon a policy which he had effected, paid the assured the full amount of the money subscribed; and it was held that he could not recover back any part of it, upon the ground that before the loss happened, one of the underwriters upon the policy had become insolvent, and that he was not aware of the fact when he paid the money. In *Simpson v. Swan*,§ a factor upon selling goods took a security payable to

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† 1 Bing. 190.

§ 13 B. R. 805 (3 Camp. 291).

‡ 10 B. R. 713 (1 Camp. 411).

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himself from the purchaser, and gave his own security to the principal for the nett proceeds, without disclosing the name of the purchaser, and it was held, that if the latter became insolvent before paying his security, the factor could not compel his principal to refund the money received by him as the price of the goods. Again, in this case Lord Alvanley paid the bankrupt a sum of 7,146*l.* in consequence of the attorney's application to him and Lord Foley, which was made on account of the annuitants only. Lord Foley was a surety, and these payments having been made by Lord Alvanley in consequence of that application, must have been made on account of the annuities, and in order to discharge Lord Foley, the whole 7,146*l.* was, therefore, applicable to discharge the 9,000*l.*, and must be apportioned *pro rata* among the different persons to whom the annuities were due, and in whose behalf the application was made. In that case 1,490*l.* must be applied to the payment of the 1,881*l.* which was the proportion of the 9,000*l.* due at that time from Lord *Alvanley to the defendant, and that exceeds the sum now claimed by the plaintiffs.

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ABBOTT, Ch. J. :

After the opinion which we have expressed upon the other points in this case, the only remaining question is, whether the bankrupts received from Lord Alvanley a sum equal to 1,349*l.* which they ought to have applied to the defendant's account. The circumstances attending the bill of 1,000*l.* have been relied upon by the defendant, and if the bankrupts are to be considered as having paid that sum as money received to the use of the defendant, and are not at liberty to call it back, it must be deducted from the 1,349*l.* But it seems to me that if the case rested there, the defendant would have great difficulty in establishing his right to that sum, because at the same time when the defendant was informed that he might draw for 1,000*l.* on the credit of the sums due from Lord Alvanley, he was also informed that those sums were not *then* received, and when the bill became due on the 15th of May, the defendant was again informed that the money due from Lord Alvanley had not been received. I have great difficulty, therefore, in saying that

Howard and Gibbs are bound by that bill. But the case on behalf of the defendant as to this part of the case, assumes another shape. It appears, that on the 31st of October, Gibbs desired his attorney to write to Lord Alvanley and Lord Foley, who had become surety in several annuity transactions, to demand payment of the arrears of those annuities, but Gibbs desired that he would so write as to make it appear that he was writing, not at the instance of Howard and Gibbs, but at the instance of the annuitants themselves; and accordingly, *at two different times, the attorney wrote letters to Lord Alvanley and Lord Foley upon the subject. The question is, whether the sums paid by Lord Alvanley after these letters had been written, are to be applied to the discharge of the annuities for which Lord Foley was a surety. Gibbs afterwards, on the 4th of November, told the attorney that he had received a sum of money from Lord Alvanley, but did not specify the amount. On the 6th the attorney had an interview with Lords Alvanley and Foley, and pressed them for further sums. Lord Foley appeared very much hurt at being pressed, and remonstrated with Lord Alvanley, who promised that he would pay the same afternoon a handsome sum. On the next day Lord Alvanley went to the chambers of the attorney, and threw down bank notes, which are ascertained now to have amounted to 2,800*l*. The money was offered to the attorney, evidently as the agent of the annuitants on whose behalf he had written; but he declined to receive the money, and Gibbs did, in fact, receive it, and Lord Alvanley promised that he would pay some more money in a few days. On the 10th of November he paid two sums of 500*l*., and between the 1st and the 10th of November he had altogether paid sums amounting to 7,146*l*. It is contended on the part of the plaintiffs, that Howard and Gibbs had a right to apply these sums to the bill account, and, perhaps, as between them and Lord Alvanley they might be entitled so to do; but Lord Foley had a right to interfere, and say that they should not be so applied. They were obtained in consequence of the application to him; for it is plain that Lord Alvanley, in consequence of his remonstrances, paid the money in order to relieve Lord Foley. If the money was so paid Lord Foley was

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*thereby discharged from his liability ; and Howard and Gibbs, having suffered the annuitants to lose their remedy against the surety, are bound to apply the whole of the monies received to the payment of the arrears of those annuities. I am, therefore, of opinion, that the entire sums paid by Lord Alvanley between the 1st and 10th of November ought to be applied to the annuitants, on whose behalf the attorney had written to Lords Alvanley and Foley. Now the sums for which that application was made amounted to 9,000*l.*, or thereabouts. The precise sum is not material, and suppose 7,146*l.* to have been paid on account of the 9,000*l.*, the proportion of the former sum which must be applicable to the payment of the sum of 1881*l.*, which was due to the defendant at the time when the attorney applied for payment, will be 1,490*l.*, which exceeds the sum claimed by the plaintiffs. The consequence is, that there must be judgment for the defendant.

BAYLEY, J. :

As to Rowley's annuity, I agree entirely with the opinion expressed by my LORD CHIEF JUSTICE. It is quite clear, that if an agent (employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not,) renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can shew that that statement was made unintentionally and by mistake. If he cannot shew that, he is not at liberty afterwards to say that the money had not been received, and never will be received, and to claim reimbursement in respect of those sums for which he had previously given credit. I think that when an agent has deliberately and intentionally communicated to a principal

[*730] *that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterwards to recover the money back again. With respect to the sum claimed for interest upon the bill of 1,000*l.*, it is quite clear that interest cannot be claimed for money lent, unless it appears by the usage of the trade, or by the dealings between the parties, that the intention was that interest should be given. Under the

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peculiar circumstances under which this money was advanced, I am satisfied that there never was any expectation on the part of the defendant, that he was to be liable to pay interest. The accommodation granted by Howard and Gibbs to the defendant, was to prevent that pressure upon Lord Alvanley, which would have made it difficult for Howard and Gibbs to hold him out as a person whose annuities were likely to be paid in future.

The learned Judge then commented on the facts relating to the payment of the 7,146*l.* by Lord Alvanley, and argued that the parties must have understood that payment to have been made on account of the annuities for which Lord Foley was surety, and concluded by saying, that he was of opinion that the whole of that sum ought to be divided *pro rata* among the several annuitants on whose behalf the attorney had applied to Lord Alvanley. The consequence of that was, that a larger sum would be applicable to the payment of the sum then due to the defendant than the sum now claimed by the assignees; and that being so, the judgment must be for the defendant.

HOLROYD, J. :

With respect to Rowley's annuity, the money was advanced by Howard and Gibbs to discharge it; but as that money is admitted to have been received *by them on account of Rowley's annuity, I think we are bound to consider that account as closed, with respect to the defendant. In consequence of that account the defendant drew for sums which he thought he was entitled to receive. Assuming that they really had not received those sums, yet they held out that they had received them, and they voluntarily took upon themselves to give credit for the payment of those sums to another person. The defendant drew for them, not as sums advanced to him by way of loan, but as money represented by Howard and Gibbs to have been received by them to his use, or as money not received, but for which they had agreed to make themselves accountable. It appears to me that the payment of those sums by Howard and Gibbs, under such circumstances, did not constitute a loan of money to the

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defendant, nor was it money received to the use of the bankrupts, which the defendant is now bound to refund.† I think, for the reasons already given, that there was no well-founded claim for interest. I am also of opinion that the different sums, amounting together to 7,146*l.*, must be considered to have been paid on account of the annuities. Those sums were in fact obtained through the medium of the attorney; and whatever was obtained through that medium was clearly paid, not upon the bill account, but on account of the annuities.

LITTTLEDALE, J. having been absent during part of the argument, gave no opinion.

Judgment for the defendant.

1825.
Nov. 22.

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BARROW AND ANOTHER v. BELL.

(4 Barn. & Cress. 736—741; S. C. 7 Dowl. & Ry. 244; 4 L. J. K. B. 47.)

Where, in *assumpsit* on a policy of insurance on goods warranted free from average, unless the ship were stranded, it appeared that in the course of the voyage the ship was, by tempestuous weather, forced to take shelter in a harbour, and in entering it, struck upon an anchor, and being brought to her moorings, was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground and remained fast there for half an hour: Held, that this was a stranding within the meaning of the policy.

ASSUMPSIT on a policy of insurance on goods warranted free from average, unless general, or the ship should be stranded. The first count of the declaration stated all the circumstances specially. The second was general, and alleged a stranding. Plea, the general issue. At the trial before Littledale, J., at the London sittings after last Michaelmas Term, a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case. The plaintiffs, who are merchants at Manchester, on the 18th of November, 1822, caused to be effected a policy of insurance on the *Latona*, at and from Liverpool to Gibraltar, on goods which were warranted free from average,

† See *Skyring v. Greenwood*, (1880) 5 Q. B. Div. 538; 49 L. J. p. 264, ante; *Letchford v. Oldham* Q. B. 458.

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unless general, or the ship should be stranded. The goods insured were subsequently declared to be manufactured cottons, and valued at the sum of 5,000*l.* by an indorsement upon the policy. The defendant subscribed the policy of insurance for 200*l.* The plaintiffs were interested to the full amount of the sum insured. On the 11th of December the *Latona* set sail with the goods insured on board, on her voyage from Liverpool to Gibraltar. On the 15th of December she was compelled by contrary winds and tempestuous weather, to bear away for Holyhead. Between eight and nine in the afternoon she took on board a pilot in Holyhead Bay, who piloted her into the harbour, which was thickly crowded with shipping, and whilst entering she was observed by some of the crew on board to have struck upon something, but *her progress was not thereby retarded. She was moored under the directions of the pilot, about the middle of the harbour, and in about fourteen feet water. The pilot immediately went on shore, but had scarcely quitted the ship before it was discovered that she had sprung a leak, and he had been but a few minutes on shore when the captain came to him, and informed him the vessel was sinking. Every exertion was used at the pumps by those on board, and the pilot and captain immediately returned and brought with them four men and a boat. They found four feet water in the hold, and rigged both pumps. Had the vessel remained at her moorings she must have sunk. The cable was slipped for expedition, and the ship was warped further up the harbour, towards the east end of the custom-house quay. No sails were put up, as the wind was blowing contrary to the direction in which the ship was hauled. By means of the warps, the ship was drawn upon the ground, which was at a place about a quarter of a mile from where she had been moored. She could not be got nearer to the quay than within about seven or eight yards from the east corner of it. This took place between nine and ten o'clock, and the tide was highest between eleven and twelve. The *Latona* lay for half an hour upon the ground, and was then as the tide rose hauled nearer to the quay, and ultimately alongside the east end of it, as high up as the steps leading on to the quay would allow. About one o'clock on the following morning the tide left her

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upon the ground, and she was then pumped dry and the leak fastened by a carpenter, who came on board for that tide. On the following tide the vessel was taken alongside the west side of the quay, where the vessels usually discharge. *The cargo was there unladen and examined. The leak, which proved to be on the larboard side, just under the run, and to have been caused by the vessel striking upon the fluke of an anchor in coming into the harbour, was afterwards completely repaired, and the cargo reladen, and after the space of a fortnight she returned to her original moorings, in the middle of the harbour. The vessel would draw eight or nine feet of water, and in the place where she was first moored, there would at the height of the tide be upwards of fourteen feet, but at low water in that place there would not be more than from one to two feet. At the entrance of the harbour there is at low water about seventeen feet, and it grows gradually less higher up the harbour, until it becomes quite dry. The ships in the harbour generally lie afloat, both at the flood and ebb tide, but when the harbour is much crowded, as was the case when the *Latona* entered, they are obliged to be carried so high up as to be dry and lie on the mud when the tide is out. The *Latona* proceeded upon her voyage again on the 28th of December, and reached her ultimate destination at Gibraltar with the goods insured on board, on the 12th February, 1823. The goods insured were damaged by the injury sustained, to the amount of 11*l.* 3*s.* 6*d.* per cent. on the defendant's subscription to the policy.

Campbell, for the plaintiffs :

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This was a clear case of stranding. The ship by stress of weather was forced into a port, when brought to her moorings she was found to be in a sinking state, and was in consequence drawn upon the ground, where she remained half an hour. It is no answer to say that this was done on *purpose, and that the injury to the cargo did not result from the stranding: *Burnett v. Kensington*,† *Harman v. Vaux*.‡ Thus, where a ship had run upon some wooden piles in a river, and remained fast there until the piles were cut away, it was held to be a stranding: *Dobson v.*

† 4 R. R. 424 (7 T. R. 210).

‡ 14 R. R. 773 (3 Camp. 429).

Bolton.† If, indeed, the ship had taken the ground in the ordinary course of navigation, the case might have been different: *Hearne v. Edmunds*.; But that case is expressly distinguished by the Court from *Carruthers v. Sydebotham*,§ where a pilot had improperly moored a vessel close to a dock-gate in the Mersey, and when the tide fell she took the ground and was damaged, and it was held to be a stranding; the ship having been taken out of the usual course, and improperly moored in the place where the accident afterwards happened. The same distinction is recognised in *Rayner v. Godmond*.|| The case of *Baring v. Henkle*¶ may be relied on for the defendant: there a vessel in the river Thames was run foul of by two other vessels, and thereby driven ashore, where she remained fast for an hour, and it was held not to be a stranding. But the law of that case is very doubtful, and it is distinguishable from this, for here the stranding was for the purpose of avoiding a greater impending danger.

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C.
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F. Pollock, for the defendant:

There was not in this case a stranding within the meaning of the policy. In *Burnett v. Kensington*, and *Harman v. Vaux*, there was an undoubted stranding, but this was a mere removal from one part of the harbour to another. In *Carruthers v. Sydebotham*§ *and *Rayner v. Godmond*,|| the injury sustained

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(LITLEDAL, J.: In point of law that makes no difference.)

That is so, but such a circumstance would make the Court anxious to extend the meaning of the word "stranding" as far as possible. Suppose the captain instead of drawing the ship ashore for the purpose of repairing her, had taken her into dock, she would then, on the falling of the tide, have touched and remained upon the ground, yet that would not have been a stranding. And it seems difficult to distinguish taking the

† *Marsh. Ins.* 231; *Park Ins.* 177.

‡ 21 R. R. 660 (1 Brod. & Bing. 388).

§ 16 R. R. 392 (4 M. & S. 77).

|| 24 R. R. 335 (5 B. & Ald. 225).

¶ *Marsh. Ins.* 232.

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ground under such circumstances, from that which actually happened in this case. Again, *Baring v. Henkle* is an authority in favour of the defendant: there the taking the ground did not happen in the course of the voyage, and it was held not to be a stranding: here the injury sustained in the course of the voyage was the striking upon an anchor; the vessel was afterwards moored in deep water. The subsequent act of hauling her ashore was not in the course of her voyage, and the underwriters ought not to be made answerable for it.

ABBOTT, Ch. J.:

I am of opinion that the ship was stranded within the meaning of this policy. The distinction taken in the cases cited on behalf of the plaintiff, appears to me to be a very sound distinction. What, then, are the facts of this case? A ship driven into a harbour by stress of weather, on entering that harbour meets with an accident, and being moored in deep water, is in danger of sinking. For this reason she is drawn into another part of the harbour, where she immediately takes the ground, and remains fast for some time. I cannot distinguish this from the case of a ship *on the high seas, in danger of being wrecked by a storm, and on that account allowed to be driven by the sails and rudder upon the beach of the main ocean.

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BAYLEY, J.:

The ship in this case was laid on the strand, not in the ordinary course of navigation, but, *ex necessitate*, to avoid an impending danger. It is, therefore, clearly within *Burnett v. Kensington*, and the plaintiff is entitled to recover for the damage sustained by his goods.

HOLROYD and LITTLEDALE, JJ. concurred.

Postea to the plaintiff.

THE KING *v.* CHURCHILL AND BOOTH.

(4 Barn. & Cress. 750—756; S. C. 6 Dowl. & Ry. 635.)

1825.
Nov. 23.
[750]

The burgesses of Nottingham, and the occupiers of ancient messuages there, had as such, for a certain portion of the year, a right to turn cattle into certain fields, and to exclude, during that period, the owner of the soil: Held, that this was a mere right of common,† and not rateable to the relief of the poor.

CHURCHILL and Booth appealed against a poor-rate for the town and county of the town of Nottingham, on two grounds; first, that they were improperly rated for certain lands of which they were not occupiers; and, secondly, that other persons who were *occupiers of land were not included in the rate. The Sessions amended the rate, by striking out the names of the appellants from the rate in respect of the land for which they were respectively rated; and as to all other persons named therein they confirmed the rate, subject to the opinion of this Court upon the following case. The town and county of the town of Nottingham consists of the three parishes of Saint Mary, Saint Peter, and Saint Nicholas. In the parish of Saint Mary there are large fields or tracts of land, called the Sand Field, the Clay Field, and the Meadows, belonging to different persons. The land called the Meadows consists of about 280 acres, to the pasturage and herbage of which the burgesses, resident in the said three parishes, even if they are inmates, not renting or holding any tenement or hereditament whatever, are exclusively entitled; and to turn in three head of large cattle each from Old Midsummer Day to Old Lammas Day, when all the cattle are taken out, and the pasturage is laid till the 3rd of October, when the said burgesses are again exclusively entitled to turn in a like number of cattle until the 2nd of February following, which pasturage and herbage is of the value of 10s. per acre between Old Midsummer and Candlemas. The quantity of land in the Sand and Clay Fields comprises about 650 acres, fenced off into different sized closes belonging to different individuals. The

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† Observe that this description of the right is denied to be accurate by BLACKBURN, J. in his judgment in *Johnson v. Barnes* (Ex. Ch. 1873) L. R. 8 C. P. 527, 532; 42 L. J. C. P. 259.—R. C.

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said burgesses, resident in the said three parishes, and also the occupiers of ancient messuages in the said three parishes, and who as such occupiers are severally rated to the poor in their respective parishes in respect of their messuages and other property, but not for such common right, claim, and such of them as choose, exercise the right to turn in three head of large cattle from Old Lammas Day to Old Martinmas Day in every *year, during which period neither the owner of the freehold nor the tenants have, as such, any right to turn in cattle therein; and during that period the pasturage and herbage of the said fields are also of the value of 10s. per acre. The several persons named in the notice of appeal, and who have been duly served with the same, had each of them cattle, some three, some two, and some one, in either the fields or meadows, during some part of the time the same were commonable, and at the time of making the said rate; but none of such several persons were included in the said rate for so depasturing their cattle, nor has it ever been usual in the said parish of Saint Mary to rate the persons turning into the fields and meadows during the time of their so being open; and the Court of Sessions refused to quash or amend the rate, on account of such burgesses and occupiers of ancient messuages being omitted to be rated, from the impossibility of ascertaining and rating the whole of such persons so turning into the said fields and meadows, for their actual occupation and enjoyment, there being upwards of two thousand burgesses entitled so to turn in, besides the occupiers of many hundred messuages, many of whom exercise such rights in different modes and at different times, as by turning in one or more head of cattle for a night, or a day, and in other ways, and there being no coin small enough to assess some of them if they were liable to be rated only for their actual occupation and enjoyment.

Scarlett and S. Phillippa, in support of the order of Sessions:

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The justices at Sessions having amended the rate by striking out the names of the two appellants, they were no longer aggrieved by the rate, and had no right to insist upon the other objection, viz., that certain *persons had been improperly omitted. But

that objection to the rate is clearly invalid. Upon the case it appears, that the burgesses and the occupiers of ancient houses, about 2,000 in number, have an exclusive right of pasturage in three parcels of land during a certain portion of the year. That is a mere right of common, and not an occupation: the parties exercising it were not therefore liable to be rated: *Rex. v. Bailiffs of Tewksbury*,† *Rex v. Bailiffs, &c. of Sudbury*.‡ If the fields are vested in the corporation for the benefit of the burgesses, the corporation should be rated.

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Nolan and Balguy, contra :

There is no weight in the preliminary objection. The appellants were only exonerated in respect of the land for which they were rated, and might be still aggrieved by the rate. As to the other and main point, the rate was defective. This occupation does not at all resemble agistment, for there the party takes a certain definite portion of the herbage, and pays an immediate profit to the paramount occupier. But these persons have, for a long period, the exclusive occupation, and if they are not rateable, no one else is. The cases which have been cited do not apply, for there it was found that the corporation were the occupiers. Here it is found that the burgesses were in the occupation of something producing benefit to them, they were therefore rateable. It is not necessary to enquire into their title, it is sufficient that they occupied; and upon the facts found, they were occupiers. The case of *Rex v. Watson*§ is an authority *for these appellants. In *Rex v. Sudbury*,† BAYLEY, J. pointed out two circumstances which distinguished that case from *Rex v. Watson*, viz. that in the latter the individuals who turned on had the exclusive enjoyment of the land for the purpose of turning on their cattle, and that no payment was made by them to the corporation. The same distinctions exist between this case and *Rex v. Sudbury*; it cannot, therefore, be governed by it.

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BAYLEY, J. :||

In order to prove a person liable to be rated, it is necessary to

† 13 East, 155.

‡ 25 R. R. 423 (1 B. & C. 389).

§ 5 East, 480.

|| Abbott, Ch. J. was absent.

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shew that he is an inhabitant or an occupier of lands, houses, &c. The question here is, whether the persons whose names are alleged to have been improperly omitted out of the rate were individually occupiers of land. The word "common" is well known to the law, and Lord Coke says there are four kinds of common of pasture; common appendant, which is appendant to arable land; common appurtenant, for which one must prescribe (in a que estate); common per cause de vicinage, which is but an excuse for trespass; and common in gross, which is so called, for that it appertaineth to no land, and must be by writing or prescription. Land lies in livery, but a right of common in grant. Does that for which it is attempted to rate the burgesses of Nottingham lie in grant or in livery? Each has a right to turn three cattle upon certain fields during a certain portion of the year. It is claimed by them as burgesses, and as occupiers of ancient houses. Could they be entfeoffed of such a privilege? *If not, it is plain that they have no right to the soil, but merely an incorporeal hereditament, a right of common by prescription, which is not rateable. The order of Sessions was therefore right.

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HOLROYD, J. :

I think that the burgesses cannot be rated in respect of their right to turn cattle upon the lands in question. It appears to me that the right is vested in the corporation, for the benefit of its members. A *profit à prendre* in the soil of another cannot be claimed by custom, except in the case of a copyhold or tenant right, where it is claimed in the soil of the lord.† In other cases it can only be claimed by grant or prescription. Now the burgesses in this case cannot take as a corporation, and cannot prescribe for the right in themselves, according to the case of *Mellor v. Spateman*.‡ Supposing, therefore, that there was a possession in law of those fields, so that trespass might have been maintained either by the corporation or the burgesses, I think it must have been by the corporation.§ But this appears to me a

† See *Foiston v. Crachroode*, 4 Co. Rep. 31 a.

‡ 1 Saund. 339.

§ In Com. Dig., Common (H), it is said that a commoner cannot main-

tain trespass for damage to the soil or grass; for he has no interest but to take the pasture by the mouths of his cattle.

mere incorporeal right, and not within any of the words in the statute 48 Eliz. c. 2. Land to which a right of common is attached may on that account be rated at a higher value, but the right of common is not rateable *per se*.

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LITTLEDALE, J. :

I think that the burgesses could not as individuals be rated. They had a mere right of *common, and according to the decided cases that is not the subject of rating. It is said, that the exclusive pasturage gave them the exclusive interest. I think it had not that effect, and that they could not maintain trespass as persons having the *primam vesturam*. The right enjoyed by these burgesses could only be claimed by prescription in the name of the corporation. According to Com. Dig. Prescription (H), there may be a prescription for sole and several pasture, so as to exclude the owner of the soil, as appears also by *Hoskins v. Robins*;† and under such circumstances the persons enjoying the right may grant it to others. But in this case no such grant to others could be made by the burgesses: the exclusive right was in the corporation, and they had it but for a limited time, and could only take it by grant or prescription. The burgesses could not take it by either of those modes; which shews that they had a mere privilege of turning on cattle, in respect of which they were not rateable. The order of Sessions must, therefore, be confirmed.

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Order of Sessions confirmed.

† 2 Saund. 324; and see *Potter v. North*, 1 Saund. 353, n. (2).

1825.
Nov. 25.

THE KING v. THE JUSTICES OF MONMOUTHSHIRE.†

(4 Barn. & Cress. 844—849; S. C. 7 Dowl. & Ry. 334.)

[814]

Upon an appeal against an order of removal, the justices at Sessions were equally divided in opinion upon a question of fact, on which the settlement of the pauper depended. The Sessions thinking that it lay on the respondent parish to establish their case to the satisfaction of a majority of the Court, quashed the order of removal. The Sessions having decided the case, this Court refused a mandamus.

By an order of two justices John Williams was removed from the parish of Abergavenny to the parish of Saint John the Evangelist, in the borough of Brecon; the latter parish appealed; and the appeal was heard at the Michaelmas Sessions, 1824. Upon the hearing, the Sessions quashed the order. A rule *nisi* for a mandamus had been obtained on an affidavit stating, that the justices at Sessions were equally divided in opinion on the case, and that thereupon the counsel for the appellants had contended that they were bound to adjourn the appeal, but that the Sessions refused to do so, and quashed the order. In answer to this there was an affidavit stating that, upon the hearing of the appeal, the counsel for the appellants had insisted on two points, one of which was that the respondents had failed in proving that the pauper had resided forty days in the appellant parish, and that the chairman after the hearing had said that it might be convenient to take the opinion of the justices on the points separately, because if the residence were not proved, it would be unnecessary to decide the other question, inasmuch as the respondents must then at all events fail; that upon the question whether the forty days' residence were proved, the justices were equally divided, and having then taken into consideration what judgment they ought to give, they determined, without any division, to quash the order.

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Scarlett and Maule shewed cause :

Whether the decision of the Sessions were right or wrong, this

† Cited and applied in judgment of COCKBURN, Ch. J. in *The Queen v. Overeers of Walsall* (1878) 3 Q. B. D. 457, 468; 47 L. J. Q. B. 710, 716;

and by Lord HERSCHELL, L. C. in *Ex parte Evans* (H. L. 1893) '94, A. C. 16, 20; 63 L. J. M. C. 81, 83. —B. C.

Court ought not to interfere by mandamus. But, secondly, the decision of the Court of Quarter Sessions was right. It is true that it is said in Nolan's Poor Laws† that "if the magistrates who have a right to join in the Court's determination, should be equally divided in opinion, no judgment can be given, but the appeal must be adjourned from Sessions to Sessions, if necessary, until a majority shall be of opinion either on one side or the other." And in the note‡ it is said, "This seems to be their bounden duty; for otherwise the Court will grant a mandamus to compel them to enter continuances, and hear the appeal at a subsequent Sessions." *Bodmin v. Warlingen*,§ and *Rex v. The Justices of Westmoreland*,|| are cited in support of, but do not support these positions. In the former of these cases the justices were equally divided, and neither made an order nor adjourned the appeal, and at a subsequent Sessions quashed the order of removal, and this Court afterwards quashed the order of Sessions, because it was made without adjournment. This is an authority only that a subsequent Sessions has no jurisdiction over an appeal made to a former Sessions, unless adjourned, but does not shew that if the former Sessions had given judgment (though equally divided) against the order, that judgment would have been wrong, still less that this Court would have interfered by mandamus. In *The King v. Westmoreland*,|| the justices being equally divided, neither gave judgment nor adjourned, and on an application for *a mandamus, though the Court intimated an opinion in its favour, nothing was done; but if a mandamus had been actually granted, that would only shew that the Court will compel the Sessions to proceed to judgment in an appeal which they had begun to hear, and improperly refused to go on with. In the present case the application is to rehear and again pronounce judgment on a case in which one judgment has already been given. No instance of the kind can be cited: the Court it is true will compel an inferior jurisdiction to entertain or to proceed on a case when they improperly neglect to do so, but they will not, upon an application for a mandamus, review a judgment actually given. When the Sessions have given a

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† 2 Nol. p. 446, third edit.

‡ 2 Nol. 446.

§ 2 Bott. 733.

|| 2 Bott. 734.

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judgment, this Court will never review that judgment on facts not appearing on the record, or stated by the Sessions for its opinion. Supposing they were wrong, there is no more reason why this Court should grant a mandamus to them to rehear the case, than if their error had been as to any other point of law, such as mistaking a dissolution of service for a dispensation; in such cases it is clearly settled that this Court will interfere only upon a case reserved by the Sessions. If it were otherwise, parties would always prefer making their own statements by affidavits, to asking the Sessions for a case; and the discretion of the Sessions to refuse a case would in effect be taken away. *Rex v. Leicestershire*† is a case in point against the application. But, secondly, when the nature of an appeal against an order of removal is considered, it will appear that the judgment of the Sessions was right. In the House of Lords, if the House be equally divided on an appeal, or *a writ of error, the respondent or defendant in error prevails. But then those are proceedings in which the same question has been determined in a contested suit between the parties in the Court below, upon the same materials as are before the court of error, viz., the facts appearing upon the record; and in such proceedings the presumption is in favour of the party who is in possession of the judgment of the Court below. The proceeding before the Sessions on an order of removal, though called an appeal, is of a totally different nature. It is in reality an original proceeding against the appellants. The question has never been contested before, and the materials before the Sessions are not the same as those before the justices who made the order *ex parte*. The question which the two justices before had to determine was, whether the evidence produced, by the complaining parish officers, before them was sufficient to shew that the pauper was settled in the appellant parish. The question which the Sessions had to determine was, whether the result of the evidence adduced by the appellants and respondents before them shewed the same thing. These questions are evidently different, one of them may be determined in the affirmative, and the other in the negative, and both determinations may be right. The determination,

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† 14 R. B. 494 (1 M. & S. 442).

therefore, of the former in favour of the respondents, raises no presumption on the discussion of the latter against the appellants, who moreover ought not in justice to be bound even to the extent of having the *onus probandi* thrown on them by a proceeding to which they were no parties. Then if the hearing of an appeal be an original proceeding in which the respondent parish have to prove their case, it follows, that if they have not a majority of the Court in their *favour, judgment might be given against them; as in other Courts the party succeeds who would succeed if nothing were said on the other side, or at the Sessions if the respondent offers no evidence, the appellant having proved his notice of appeal (which is necessary in order to give the Court jurisdiction), has a right to have the order quashed as a matter of course. Besides it may be observed, that there is no other case in which a Court is compelled to adjourn a cause before it which is ripe for a decision; and that much greater inconvenience will probably arise from such an adjournment than from adhering to the principle acted upon in other Courts, that when the party who has to establish a case, fails to do so to the satisfaction of a majority of the Court, judgment must be given against him.

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Watson, contra :

Rex v. The Justices of Leicestershire† is not in point, because in that case the clerk of the peace did not discover during the Sessions that the number of votes on each side was equal, and Lord ELLENBOROUGH expressly says, “if it had been found at the Sessions that the numbers were equal, nothing would have been done upon it, for it would have been a nullity.” Here it was insisted, upon the hearing of the appeal before the Court of Quarter Sessions, that the justices being equally divided in opinion, the matter ought to be adjourned. Ever since the case of *Rex v. The Justices of Westmoreland*,‡ and *Bodmin v. Warligen*,§ it has been considered an established rule of law, that where the justices at Sessions are equally divided, the Court ought not to make any order; and in **Bodmin v. Warligen* it was

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† 14 R. R. 494 (1 M. & S. 442).

§ 2 Bott. 733.

‡ 2 Bott. 713, 733.

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said by the Court, that where the justices were equally divided in opinion, that was a sufficient warrant for the clerk of the peace to have entered an adjournment, and it was his duty so to have done.

ABBOTT, Ch. J. :

I think that the rule for a mandamus ought to be discharged. It appears that, in this case, the Court of Quarter Sessions have given their judgment. This Court is not a court of error from that Court; it may compel the Court of Quarter Sessions by mandamus to proceed to hear and decide the appeal; but when they have so determined it, this Court cannot compel them to correct their judgment if it appear to be erroneous. It is unnecessary to say whether the judgment pronounced by the Court of Quarter Sessions was erroneous or not, because we are of opinion, that even if it were so, we have no jurisdiction to compel them to correct it.

Rule discharged.

1825.
Nov. 26.
[855]

THE KING v. THE BENCHERS OF LINCOLN'S INN.†

(4 Barn. & Cress. 855—861; S. C. 7 Dowl. & Ry. 351.)

The Court will not grant a mandamus to compel the Benchers of one of the Inns of Court to admit an individual as a member of the society with a view to his qualifying himself to be called to the Bar.

In Michaelmas Term, 1824, Mr. T. J. Wooller made an application at the steward's office of the Society of Lincoln's Inn, to have his name enrolled as a member of that society, and left a paper containing his name, &c., conformably to the regulations of the society. In Hilary Term, 1825, he received an official letter from the steward, informing him that his application to the society was rejected by the Benchers. On the 27th January, 1825, Mr. Wooller presented a petition to the society praying to be heard upon the subject in his own behalf. Not having

† Cited and applied by HALL, 409, 416; and in *Manisty v. Kenealy* V.-C., in *Neate v. Denman* (1874) (1876) 24 W. R. 918, 920.—R. C. L. R. 18 Eq. 127, 136; 43 L. J. Ch.

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received any answer to this petition, he, on the 9th of April, addressed a petition to the twelve Judges, as visitors of the Inns of Court, praying redress. On the 20th of April he was informed by a letter from the clerk to the Lord Chief Justice of the Court of King's Bench, that the Judges had no power to interfere in the matter. On the 17th of May he addressed another petition to the Benchers of Lincoln's Inn collectively, and sent a copy of it to each individually, praying that an opportunity might be afforded him of being heard upon the subject of his former application, *or that the society would assign their reasons for refusing to admit him a member. He was subsequently informed by the steward that his second petition had been rejected by the council without any reason being assigned for such rejection. Mr. Wooller now made an affidavit of the matters before stated, and applied for a rule, calling upon the Masters, Treasurers, and Benchers of Lincoln's Inn to shew cause why a writ of mandamus should not issue, commanding them to admit him as a member of their society for the purpose of qualifying himself to be called to the Bar. The Court had intimated to Mr. Wooller, on a former day, that they thought they had no jurisdiction on the subject, and desired him to direct his attention to that point.

Mr. Wooller (in person) now admitted that he had not been able to find any precedent precisely in point, but contended that inasmuch as it was *primâ facie* the right of every individual to be permitted to practise as a barrister, and that as he could only qualify himself so to do by becoming a member of one of the Inns of Court, this Court ought, under the circumstances, to grant a mandamus, inasmuch as there was no other mode of redress. In the case of *The King v. The Benchers of Gray's Inn*,† this Court refused a mandamus to compel the Benchers to call to the Bar a member of the society who had complied with the usual requisites, but that was not on the ground that they had no jurisdiction, but because the applicant had another remedy, viz. by appeal to the twelve Judges. It may fairly be inferred from that case that if there had been no other remedy the Court would have granted a mandamus. In this case it appears that

† Doug. 339.

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the twelve Judges have no jurisdiction, *and, therefore, if the Court do not interfere by mandamus, there will be no means of enforcing the right. In that case, Lord MANSFIELD, speaking of the society, says, "They are voluntary societies, which for ages have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the Bar is delegated to them from the Judges, and in every instance their conduct is subject to their control as visitors." If this be not a case in which the twelve Judges can interfere, what other government can these societies be called upon to submit to, except that of this Court? The writ of mandamus is a writ calculated to afford a remedy for injuries for which there is no other prescribed mode of redress by law. If this Court has no jurisdiction, this consequence will follow, that the Benchers may arbitrarily refuse to admit as a member of the society any individual who is under no personal disability, and thereby prevent him from practising the law as a barrister; which it is the right of every subject, willing to conform to certain regulations, to do. In *The King v. The Vice-Chancellor of Cambridge*,† it was decided, that a mandamus lies to a university to restore to academical degrees, where there is no visitor. And in *The King and Queen v. St. John's College, Cambridge*,‡ it was laid down, that the visitor was made by the founder, and was the proper judge of the private laws of the college, and was to determine offences against those laws; but that where the law of the land is disobeyed, this Court will take notice thereof, notwithstanding the visitor; and in this case the proper way to put it in execution is by this writ of mandamus.

[858] ABBOTT, Ch. J. :

I am of opinion that this Court has no power to compel the Benchers of this society to permit any individual to become a member of the society, or to assign any reasons why they do not admit him. There is not any instance where a mandamus has been applied for to compel any such society to admit a person a member. In *The King v. The Benchers of Gray's Inn* § Lord

† Str. 557; Ld. Ray. 1334.

‡ 4 Mod. 241.

§ Doug. 339.

MANSFIELD, speaking of these societies, says, "They are voluntary societies." The very term "voluntary society" imports in it a discretion in the individuals composing it to admit or reject members as they please. It is true, that the twelve Judges are the visitors of the Inns of Court, but in that character they have jurisdiction only over actually admitted members. When Lord MANSFIELD said they were "voluntary societies which for ages have submitted to government analogous to that of other seminaries of learning," he must be understood to have meant that they submit to such rules and regulations as they themselves ordained for the internal government of the society, but not that they submit to any order of a foreign jurisdiction, as to the persons whom they are to admit as members. If the party now applying to the Court were an actually admitted member of the society, and had acquired an inchoate right capable of being perfected, it might then be fit for this Court (in the absence of any other remedy) to interfere by mandamus in order to perfect that right; but if the particular society improperly refuse to call a particular member to the Bar, the remedy is not by mandamus but by appeal to the twelve Judges. It has been argued, that every individual has *primâ facie* an inchoate right to be a member of one of these *societies, for the purpose of qualifying himself to practise as a barrister. If that proposition were established there would be a sufficient ground for granting a mandamus, but I apprehend that there is no such inchoate right. It might as well be said that every individual had an inchoate right to be admitted a member of a college, in either of the Universities, or of the College of Physicians, or any other establishment of that nature. But supposing an individual were desirous to practise medicine in London, this Court would not grant a mandamus to compel the College of Physicians to admit him as one of their members, or as a licentiate. I think, therefore, that in this case we ought not to grant a mandamus.

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BAYLEY, J.:

I am clearly of opinion that this Court cannot compel the Benchers of the Society of Lincoln's Inn to admit this individual to be a member of their association. A mandamus lies only

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where the party applying for it has a right to have a particular thing done, and where there is an obligation upon the other party to do it. Now, considering the nature and institution of this society, I think there is no duty incumbent upon them to admit as members of their society all who think fit to apply. I think that the Benchers may by law exercise a discretion upon the subject. There may be a great difference between this case and one where a party has been admitted and suffered to incur expence for a length of time, and then applies to be called to the Bar. In that case he has an inchoate right to be called to the Bar. But then the remedy is not by mandamus, but by appeal to the twelve Judges. Every individual, however, has not an inchoate right to be admitted a member of any of these societies. They make their own rules as to *the admission of members ; and even if they act capriciously upon the subject, this Court can give no remedy in such a case ; because in fact there has been no violation of any right. This case is analogous to that of a college. An individual has no inchoate right to be admitted a member of a college, and there is no obligation upon the college to admit him. If it could be shewn that every individual had an inchoate right to be admitted a member of these associations, and that there was an obligation in the latter to admit him, and that the party aggrieved had no other remedy, then it would follow that this Court would be bound to grant a mandamus ; but there being no such right or obligation in this case, I think there is no ground for granting a mandamus.

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HOLROYD, J. :

The only question is, whether this individual has a right to insist upon being admitted a member of the society. I think he has no such right. All persons have not a right to be admitted members of a college. They must be approved of by the college, or by those to whom the college has delegated the power of exercising a discretion as to the persons they admit. I think that no person has a right to be admitted a member of one of these societies unless he be approved of by the society, or by those persons who are deputed to exercise the discretion on behalf of the society.

LITTLEDALE, J. :

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I am of the same opinion. When these are said to be voluntary societies submitting to government, that must be understood to import that they submit to a government to be exercised on the members of the society. In all the cases which have come before the Judges, the persons applying have been *themselves members of the society. The Judges, who are visitors, interfere on the principle of exercising an authority over the members of the society, as to their being called to the Bar. This is not a case where the Judges could be called upon to interfere to make the Benchers submit to government as to one of the members. But here, the Court is called upon to control the society in the admission of their members. Now, as far as the admission of members is concerned, these are voluntary societies, not submitting to any government. They may in their discretion admit or not as they please, and this Court has no power to compel them to admit any individual. The masters and fellows of a college cannot be compelled to admit a particular individual a member. Neither can a corporation be compelled to admit a particular individual a freeman, unless he has acquired an inchoate right to become a freeman. The interference of the Judges in the instance of those members of the societies whom the Benchers have refused to call to the Bar is perfectly right; because a member who has been suffered to incur expence, with a view to being called to the Bar, thereby acquires an inchoate right to be called, and if the Benchers refuse to call him they ought to assign a reason for so doing; and if there be no reason, or an insufficient one, then the member who has acquired such inchoate right is entitled to have that right perfected.

Rule refused.

1825.
Nov. 28.

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REID AND OTHERS v. HOLLINSHEAD AND ANOTHER.†

(4 Barn. & Cress. 867—880; S. C. 7 Dowl. & Ry. 444.)

A., a merchant in London, by letter, directed B., a broker in Liverpool, to purchase 1,000 bales of cotton, and stated that B. was to be allowed to be one-third interested therein, acting in the business free of commission. B. agreed to purchase the cotton, and to hold one-third interest therein, charging no commission. B. purchased the cotton, and in the subsequent correspondence, which continued for upwards of three months, the transaction was referred to as a joint account, joint concern, joint purchase, joint speculation, joint cotton adventure. B. transmitted policies of insurance against loss by fire to A., and stated that the cotton was deposited in rooms rented by him (B.), and that he held the key for their joint security: Held, that B. was interested as a partner in the cotton, and consequently that a pledge of the whole by him, without any fraud or collusion on the part of the pawnee, gave a right to the pawnee to hold the goods as against A.

TROVER to recover two-thirds of 200 bales of cotton. Plea, general issue. At the trial before Abbott, Ch. J., at the London sittings after Michaelmas Term, 1823, the jury found a verdict for the plaintiffs, subject to the opinion of the Court on the following case.

The plaintiffs were merchants in London, and the defendants were brokers in Liverpool. In the months of February and April, 1820, Messrs. T. Davidson and J. Milligan, of Liverpool, who traded under the firm of Davidson & Co., bought 712 bales of cotton in different parcels. The following correspondence between the plaintiffs and Davidson & Co. shews the agreement under which they were so purchased, the account upon which they were bought, and the interest of each party. On the 11th of February, 1820, the plaintiffs wrote to Davidson & Co. a letter, of which the following is an extract: "In consequence of the representations made to us in yours, we hereby authorise you to purchase 1,000 bales of bowed cottons of good quality at the lowest price at which you can obtain it against your drafts on us at three months' date, you to be allowed to be one-third interested therein, acting in the business free of commission." To which Davidson & Co. returned the following answer on the 14th

† Cited and followed by the *v. De La Torre* (1876) 34 L. T. 123.
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*February, 1820. "We are happy that you think favourably of an investment in cotton, and make due note of your order of 1,000 bales of boweds. We shall be happy to hold one-third interest therein, charging no commission. In expectation that you might authorise us to do something in this way, we picked up 137 bales on Saturday at 12*d.*, which we consider a bargain, and enter them accordingly to the *joint* account." On the 17th February, 1820, the plaintiffs wrote to Davidson & Co.: "We duly note by your favour of the 14th instant, that you take one-third share in the proposed purchase of 1,000 bales of cotton, and that you have already secured 137 at what appear favourable terms. You must judge whether our *joint* speculation is still advisable." On the 23rd February, 1820, Davidson & Co. wrote to the plaintiffs as follows: "We have this day purchased for the *joint* account, 200 bags bowed cottons at 12*d.* The quality is good, and we trust the purchase will meet your approbation." The 200 bags so purchased were those, two-thirds of which were sought to be recovered in this action. On the 24th of February Davidson & Co. wrote again to the plaintiffs: "We have been tempted by the superior quality and condition of a lot of boweds we fell in with to-day, and have added to the joint concern 267 bales at 12½*d.*" And on the 26th of February they wrote and advised two drafts of that date for 975*l.* 13*s.* 8*d.* and 861*l.* 6*s.* 5*d.* at three months, which they required the plaintiffs to honour and place to the debit of cotton on *joint* concern. On the 28th of February the plaintiffs wrote to Davidson & Co. as follows: "We have received your favours of the 23rd, 24th, and 26th, and make due note of your purchases of cotton, and your drafts for 975*l.* 13*s.* 8*d.* and *861*l.* 6*s.* 5*d.*, in part payment of the *joint* concern." On the 4th of March, 1820, Davidson & Co. wrote to the plaintiffs as follows: "We have now to advise our draft of this date for 2,793*l.* 12*s.*, which please honour and place to the debit of the joint purchase of cotton." To which, on the 6th of March, 1820, the plaintiffs replied: "We pay due attention to the contents of your esteemed favour of the 4th instant, and to your draft for 2,793*l.* 12*s.* on the joint account." On the 8th of March, 1820, Davidson & Co. wrote to the plaintiffs as follows: "We have

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to advise our draft of the 6th current, for 3,820*l.* 5*s.* for the last purchase of cotton on the joint account." On the 10th of March the plaintiffs answered as follows: "We have received your esteemed favour of the 8th instant, and have made due note of your draft for 3,820*l.* 5*s.* on the joint account." On the 25th of March, 1820, Davidson & Co. wrote to the plaintiffs: "We now beg to enclose you the policies on the cotton purchased on *joint* account, one of them you will observe includes two lots not belonging to us. These cottons are all, of course, duty paid, and as such, never deposited in any public warehouse. The rooms in which they are stored are rented by us, and we hold the keys for our *joint* security." On the 29th of March the plaintiffs acknowledged the receipt of the policies by a letter, in which there was the following passage: "How is your cotton market now generally, and how does it bear with reference to the prices given for this commodity recently on our *joint* account?" On the 4th of April, the plaintiffs wrote to Davidson & Co.: "As we conceive a sufficient quantity of cotton has been purchased on this *joint* account, under present circumstances we will not make any further *purchases." On the 4th August, 1820, the plaintiffs wrote to Davidson & Co.: "We would lose no opportunity of getting out of our joint adventure." On the 16th September, 1820, the plaintiffs wrote to Davidson & Co.: "We have no opinion of cotton, and are desirous of our joint speculation being realized." And on the 21st September, 1820, Davidson & Co. wrote to the plaintiffs: "We have not been able to make a beginning in the sale of the joint cotton to-day, but this matter shall have our constant attention until its close." On the 30th November, Davidson & Co. wrote, with a remittance, to the plaintiffs: "We beg to enclose you three bank-post bills of 100*l.* each, which please carry to the credit of our joint cotton adventure." The receipt of which was acknowledged by the plaintiffs, "to the credit of the joint adventure." Several remittances were afterwards made by Davidson & Co. to the plaintiffs of the proceeds of parcels of the cottons when sold, which were remitted and received to the "credit of the joint account." Davidson & Co. purchased the cotton in their own names in different parcels from different merchants in Liverpool,

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and the invoices were made out by the sellers to Davidson & Co. as purchasers. The whole of the cotton was paid for by bills of exchange, drawn by Davidson & Co. upon the plaintiffs for the amount of the invoice cost as the purchases were effected, and these bills were duly paid by the plaintiffs.

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Davidson & Co. were general American commission merchants, and also transacted business upon commission, which was known to the defendants, who had been employed by them as brokers for many years, and they occasionally purchased goods on their own *account. Part of the above-mentioned quantity of cotton being the 200 bales in question was deposited by Davidson & Co. in the warehouse of the defendants, and it was agreed between Davidson & Co. and the defendants that the latter were to be employed as brokers to effect sales of this cotton. The defendants were in the habit of making advances from time to time to Davidson & Co. In the month of January, 1821, an advance of 1,000*l.*; in the month of March, 1821, an advance of 1,500*l.* was applied for by Davidson & Co. from the defendants, who made them by giving their acceptances for those amounts. In consideration of such advances being made, Davidson & Co. pledged to the defendants as a security, unknown to the plaintiffs, the 200 bales of cotton in question, which were at those times remaining in the defendants' warehouse. No funds were provided by Davidson & Co. to pay the bills, which were paid when due by the defendants. After this pledge of the 200 bales of cotton, and while it remained in the defendants' warehouse, Davidson & Co. became bankrupts, being largely indebted to the plaintiffs on account of this particular speculation (which was unsuccessful), as also upon a general account. At the time of the pledge of the cottons, and down to the period of the bankruptcy, the defendants were ignorant that any other persons than Davidson & Co. were interested in the said cotton. Davidson & Co. at the period of the bankruptcy, were indebted to the defendants in respect of the said advances for which the said pledge was made in more than the value of the said cotton. Before this action was brought the plaintiffs demanded of the defendants the two-thirds of the 200 bales of cotton, and tendered to the defendants the expences *for warehouse-rent

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and other charges thereon, and the defendants on such demand refused to deliver the same.

The case was argued on a former day in this Term by

Kaye for the plaintiff :

This is the case of a pledge, and it is a clear principle of law that the pawnee has no better title to the pledge than the pawner had. Then the first question is, had the pawners, Davidson & Co., any interest in the cotton in question, and secondly, if any, to what extent? Interest they had none, but the cotton was the property of the plaintiffs solely. The plaintiffs authorised Davidson & Co. to purchase and sell for them 1,000 bales of cotton, and it was agreed between these parties that the plaintiffs should pay for all the cotton, and that Davidson & Co. should be interested in one-third of the profit and loss, acting in the business "free of commission." The cotton was not jointly purchased, but was expected to be and was paid for by the plaintiffs, and, therefore, was their property solely ; Davidson & Co. were their agents for the purpose of effecting the purchases and the sales, being paid for their skill and trouble by participating in the result of the speculation, instead of receiving their accustomed commission. *Smith v. Watson*[†] is an authority to shew that an agent so paid acquires no property in the goods, as against his principal, though he is liable, as a partner, to third parties, and that case must govern the present. There the goods were bought in the name of the principal ; in this case, in Davidson & Co.'s name ; but an agent buying goods in his own name, with his principal's money, does not divest the principal of the *legal property in the goods so bought with his money. The same distinction between a partnership in the subject-matter, and in the proceeds of an adventure, has been recognized in the cases of *Meyer v. Sharpe*,[‡] and *Hesketh v. Blanchard*.[§] Davidson & Co. being interested in the proceeds of the adventure only, could not pledge the cotton itself, and the defendants can derive no title under this tortious pledge. But assuming that Davidson & Co. were interested in the cotton, at the utmost, their interest

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† 2 B. & C. 401.

‡ 5 Taunt. 74.

§ 4 East, 144.

extended only to a third part of it, and according to the doctrine laid down in *Barton v. Williams*† they could not pledge the remaining two-thirds belonging to the plaintiffs, and this action is only brought for those two-thirds. In that case BEST, J., says, “A partner in a trading concern generally may dispose of the partnership property, because his authority to do so is implied from the nature of the business; but that by no means extends to a case of a partnership in a particular instance.” This was only a single transaction.

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Parke, contrà :

Davidson & Co. had a joint interest with the plaintiffs in the corpus of the goods. They were partners, for the goods were bought upon joint account, to be sold upon joint account, and according to the terms in the letter, the plaintiffs and Davidson & Co. were each to be interested *therein*, viz., in the cotton, in profit and loss. All the terms used in the correspondence, in mercantile phraseology import a partnership, “joint account, share in purchase, joint speculation, joint concern, joint adventure, joint purchase, joint cotton, joint security.” *It is clear also that the plaintiffs have a joint interest, for they claim only two-thirds. The contract between the parties was, that the plaintiffs were to contribute money, Davidson & Co. labour, and that the profits were to be divided, and that comes within the definition of a partnership given in Justinian’s Institutes, [lib. 3] tit. 25,‡ De Societate, “Nam et ita coiri posse societatem non dubitatur, ut alter pecuniam conferat, alter non conferat, et tamen lucrum inter eos commune sit, quia sæpe opera alicujus pro pecunia valet.” *Smith v. Watson*§ is distinguishable, because there the goods were purchased in the name of Sampson by Gill, who received nothing but a remuneration for his trouble; but in this case the goods were bought by Davidson & Co. in their own names. In *Meyer v. Sharpe*|| it was held, that an agent who was paid by a share of profits was not a partner; but there the bankrupt proved that the property of the goods was in himself alone; and in *Hesketh v. Blanchard*,¶ the corpus of the goods

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† 24 R. R. 448 (5 B. & Ald. 395).

‡ Cited as 26 in the report, after the old-fashioned numbering of the titles.

§ 2 B. & C. 401.

|| 5 Taunt. 74.

¶ 4 East, 144.

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belonged to Robertson. The plaintiffs, therefore, are not entitled to maintain this action, because this was a pledge of partnership property by one partner, without fraud, to an innocent party, and, therefore, the whole interest passed to the pawnee. Partners have not only a joint interest but a mutual authority to bind each other by contracts with third persons, relative to the partnership property, made without fraud on the part of such third persons. Here there was no fraud, for the defendants knew of no other person than Davidson & Co. as interested in the cotton. The rule is universal and applicable to every species of partnership property and partnership liability. *Ex parte Bonbonus*,† *Swan v. Steel*‡ are cases where the rule is recognised as applicable to a general partnership. In *Raba v. Ryland* and another,§ the same rule was applied to a particular partnership; there the plaintiffs had purchased for the joint account of themselves and Caumont, in equal thirds, 33 bags of clover seed, shipped to the consignment of Caumont, who pledged the same to the defendants for an advance of money; and it was held, that Caumont being jointly interested in the seed with the plaintiffs as a partner, he was, in that character, possessed of the entirety. And in *Tupper v. Haythorne*,|| and *Ex parte Gellar, In re Hutchinsons*¶ the same rule was applied to a particular partnership. Secondly, one-third at least was pledged, and then this action cannot be maintained. The legal interest in one-third passed, subject to an account, which cannot be taken at law. This is similar to the case of an execution against one of two partners, the sheriff must then take the goods of both, and the other party has no remedy at law, otherwise than by retaking the goods if he can, for the vendee of the sheriff becomes tenant in common with the other co-partner, and the question is, in equity, what the purchaser will be entitled to: *Taylor v. Fields*,++ *Parker v. Pistor*.‡‡ In Litt. s. 323, it is laid down, that “if two be possessed of chattels personal in common, by divers titles, as of a horse, an ox, or a cow, &c.; if the one take the whole to himself out of the possession of the

† 8 Ves. 540.

‡ 8 R. B. 618 (7 East, 210).

§ 21 R. B. 806 (Gow, 132).

|| 21 R. B. 808, n. (Gow, 135, n).

¶ 1 Rose, 297.

++ 4 Ves. 396.

‡‡ 3 Bos. & P. 288.

other, the other hath no remedy but to take this, from him who hath done to him the *wrong to occupy in common, &c., when he can see his time." Now here there is no conversion of the two-thirds. The defendants were not bound to deliver up two-thirds and make partition, or let the plaintiffs even into equal possession. The defendants have as much right to the possession of the chattel as the plaintiffs, and the keeping of possession is no wrong: *Brown v. Hedges*.† Even a delivery by one of several tenants in common to a third person is no conversion, as in the case of the society's box: *Holliday v. Camell*.‡ The demand and refusal of the whole is no conversion: *Smith v. Stokes*.§ *Barton v. Williams*|| is distinguishable, because it was not a case of partnership in profit and loss.

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Kaye, in reply :

The expression in the first letter, "You to be allowed to be one-third interested *therein*, acting in the business free of commission," is relied upon, because the word "*therein*" has relation to its antecedent cotton. Whether they were partners *inter se* depends upon the intention and understanding of the parties, to be collected from the whole correspondence and all the facts stated in the case, and not from the grammatical construction of a single sentence. The plaintiffs paid for the whole quantity of cotton, and the expression "acting in the business free of commission," shews the character in which Davidson & Co. were regarded by the plaintiffs, for "commission" is not paid as between partners. All the expressions "joint account, joint speculation, joint concern, joint adventure," &c., are consistent with the idea of a *partnership in the result of an adventure, without necessarily importing a partnership in the goods. The language in the letter to Davidson & Co. "we authorize you," and in their reply, "we make due note of your order," is such as would pass between principals and agents, and not between partners. The fire policies effected by Davidson & Co. in Liverpool upon this cotton, were sent to the plaintiffs in London, which shews that the parties considered the cotton

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† 1 Salk. 290.

‡ 1 R. R. 346 (1 T. R. 658).

§ 1 East, 363.

|| 24 R. R. 448 (5 B. & Ald. 395).

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exclusively the property of the plaintiffs. The passage cited from Justinian does not apply. It proceeds upon the assumption of that which is the whole matter in dispute here, “Si duo inter se pacti sint, ut ad unum quidem duæ partes et lucri et damni pertineant, ad alium tertia.” The question now is, whether such was the intention of these parties, whether it was so agreed between them. Neither does the reason assigned why such a partnership as that supposed in Justinian may well subsist, apply here. “Quia sæpe opera alicujus pro pecunia valet.” It is contended that Davidson & Co. were to have an actual property in one-third of the corpus of the cotton, as a remuneration for their skill and trouble in selecting, and buying, and selling 1,000 bales. The skill and labor of Davidson & Co. cannot be said in this case to be equivalent to such a remuneration. *Raba v. Ryland*,† and *Tupper v. Haythorne*,‡ and the case *Ex parte Gellar*,§ are all cases where the purchase was joint. Here the plaintiffs paid for the whole. They were not, therefore, partners, nor tenants in common, and Davidson & Co. could never have demanded a partition of the cotton. But if they were tenants in common, then the pledge of the whole

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*subject-matter of the tenancy in common, by the one tenant in common, and the subsequent forfeit of that pledge placed the cotton beyond the control of any of the tenants in common, and was equivalent to a destruction of it, and, therefore, the action will well lie.

Cur. adv. vult.

ABBOTT, Ch. J. :

This case was argued before us during the present Term. Upon the facts stated, it appears that the goods were purchased by Davidson & Co. in their own names, and remained in their possession, and were pledged by them to the defendants, who advanced money upon them without any knowledge of the plaintiff's interest therein. On the part of the plaintiffs it was contended, that Davidson & Co. had not any interest in the corpus of the goods as partners or part owners, but only an

† 21 R. R. 806 (Gow, 132).

§ 1 Rose, 297.

‡ 21 R. R. 808, n. (Gow, 135, n.).

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interest in the profit and loss that might ultimately arise out of this speculation; and, secondly, that supposing Davidson & Co. to have any interest in the goods, still they had a property in one-third only, and could not make a valid pledge beyond that extent. We are of opinion that Davidson & Co. were interested as partners in these goods, and consequently, that a pledge of the whole made by them without fraud or collusion on the part of the pawnee, gave a right to the pawnee to hold the goods as against the plaintiffs. We think the letters that passed between the plaintiffs and Davidson & Co. clearly shew that the parties understood this as a joint concern or partnership in the goods.

Such a partnership may well exist, although the whole price is in the first instance advanced by one party, the other contributing his time and skill and security, in the selection and purchase of the commodities. It is true, that the plaintiffs in their first letter *stipulate that Davidson & Co. shall act in the business free of commission, and this circumstance was relied on as making the present case parallel to that of *Smith v. Watson*,† but the facts of the two cases are very different. In that case it was stated to have been agreed between Sampson a merchant and Gill a broker, that Sampson should buy whalebone through Gill as his broker, and that, as a remuneration for his trouble, Gill should receive one-fourth of the profits arising from the sale, and bear one-eighth proportion of the losses. Goods were bought under this agreement which produced a profit. After the close of the transactions under it, Sampson entered into other speculations and continued to employ Gill as a broker, and upon these Gill was to receive one-third of the profits, but whether he was to bear any portion of the losses did not appear. All the witnesses stated that Sampson employed Gill as a broker, and never spoke of him otherwise than as his agent. Upon this state of facts it was held that Gill had no interest in the goods, and rightly so, for upon the evidence it plainly appeared that the share of the profits was merely a substitute for the broker's commission, intended probably to stimulate the exertions of Gill in buying and selling to the greatest advantage. In the

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† 2 B. & C. 401.

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[*880]

present case Davidson & Co. were not brokers; the correspondence is, in our opinion, the language of persons to be jointly interested in the purchase as well as the sale of the goods. Davidson & Co., before these transactions, occasionally purchased goods on their own account, though they were general American commission merchants, and also transacted business upon commission, *and in our opinion the stipulation that they should act in the business free of commission, plainly denotes that they were to act in it as merchants and not as agents. Considering the parties therefore as partners in the goods, the cases of *Raba* and another v. *Ryland*† and *Tupper v. Haythorne*,‡ which were quoted on the part of the defendants, are direct authorities for the validity of the pledge in the present case as against the plaintiffs. The *postea*, therefore, must be delivered to the defendants.

Judgment for the defendants.

1825.
Nov. 30.

[899]

THE KING v. CLEAR AND ANOTHER. §

(4 Barn. & Cress. 899—902; S. C. 7 Dowl. & Ry. 393; 4 L. J. K. B. 53.)

Where a party applies for a mandamus to compel churchwardens to allow him to inspect their accounts according to the directions of the 17 Geo. II. c. 38, he must state some special reason for which he wishes to see the accounts.

It is no answer to the application, that the statute imposes a penalty upon a churchwarden improperly refusing the inspection.

A RULE *nisi* had been obtained for a mandamus directed to the defendants, churchwardens of the parish of Billingham, in the county of Sussex, commanding them to permit J. Puttock, an inhabitant of the parish assessed to the relief of the poor, from time to time, and at all reasonable times, to inspect the accounts of the churchwardens and overseers of the poor of the said parish for the years ending respectively at Lady Day 1821, 1822, 1823, and 1824, the said J. Puttock paying, &c., as required by the Act. The affidavit of Puttock stated, that he had frequently

† 21 B. R. 806 (Gow, 132).

‡ 21 B. R. 808, n. (Gow, 135, n.).

§ Followed, *Ex parte Briggs* (1859)

28 L. J. Q. B. 272.

applied for leave to inspect the accounts, and had offered to pay for the same, but had been refused: he did not, however, state any reason for which he desired to make the inspection.

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Brodrick shewed cause, and contended that the applicant was bound to make out in support of his rule, first, that he had a specific legal right; and, secondly, that he had no specific legal remedy. The first point depends on the 17 Geo. II. c. 38, s. 1. Now it is to be observed, that no inspection of the accounts for the year ending at Lady Day, 1825, is demanded, and he has no *right to inspect the accounts of former years. The only purpose to be answered by the inspection, is to give the party an opportunity of appealing, but the time for appealing had elapsed as to all the rates, except those for the year ending at Lady Day, 1825. Secondly, Puttock has a specific legal remedy, if the inspection of the accounts be improperly refused, for by s. 14 of the 17 Geo. II. c. 38, a penalty is imposed upon any churchwarden or overseer who neglects or refuses to obey and perform any order or direction of the Act. But if the Court have jurisdiction in this case, as may be contended on the authority of *Rex v. Clapham*† and *Rex v. Bletshow*,‡ they will not interfere when the object of the application is not stated.

[*900]

Long, contrà :

It appears by the preamble to the 17 Geo. II. c. 38, that the Legislature had then discovered that the money raised for the relief of the poor was liable to be misapplied; and in order to remedy that evil, it was enacted, that churchwardens and overseers on quitting their office should hand over to their successors their books of accounts, and that every person assessed and liable to be assessed should have liberty to inspect the same at all reasonable times. There is nothing to limit the right of inspection to the books of the last preceding year, nor is it said that the inspection is to be had for the purposes of appeal only. In *Rex v. Clapham*, a mandamus was granted to oblige the old overseer of the poor to deliver over the books of the poors' rates to the new overseer, and it was said by the Court "They are

† 1 Wils. 305.

‡ 1 Bott. 300.

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[*901]

public books, and ought to be delivered *over by one overseer to another, that all the parishioners may have access to them, and the overseer and churchwarden for the time being ought to have the custody thereof;” and a writ was granted on similar grounds in *Rex v. Bletshow*. The penalty given by s. 14 is no answer to the application, for it is not given to the party grieved, but to the churchwardens and overseers for the use of the poor.

BAYLEY, J. :

The right of inspection given by the 17 Geo. II. c. 38, is not general, but for the remedy of the evils contemplated by the statute. The applicant should, therefore, have shewn some ground for desiring to inspect the books, and for want of such statement, I think that this rule must be discharged. It is no answer to the application, that in a subsequent clause a penalty is imposed; that is not given by way of compensation to the party grieved, but it is imposed for the relief of the poor, and to punish the offender.

HOLROYD, J. :

In Com. Dig., Mandamus (A), it is stated that the writ of mandamus is granted to prevent failure of justice, and for the execution of the common law, or of a statute, or of the King’s charter; but not as a private remedy to the party. The applicant not having stated the grounds upon which he desires to inspect the books, has not brought himself within that rule for granting a mandamus. His right as a parishioner is a mere private right, for which the Court will not grant it. The penalty, indeed, is not such a specific legal remedy as would prevent our interference, but inasmuch as I think the party should have pointed out some public *ground for the Court to proceed upon, and has not done so, this rule must be discharged.

[*902]

LITLEDALE, J. concurred.

Rule discharged.

STYLES *v.* WARDLE.†

(4 Barn. & Cress. 908—912; S. C. 7 Dowl. & Ry. 507; S. C. nom.

Warden v. Styles, 4 L. J. Q. B. 81.)

1825.

Dec.

[908]

Where a deed has no date, or an impossible date, as the 30th February, and in the deed reference is made to the *date*, that word must be construed *delivery*, but if it has a sensible date, the word “date” occurring in other parts of the deed, means the day of the date and not of the delivery; and therefore in covenant on an indenture dated the 24th December, 1822, whereby plaintiff, in consideration of 944*l.* leased to defendant a house and premises for ninety-seven years, subject to an agreement for an underlease to A. for twenty-one years; and the defendant covenanted that he would, within twenty-four calendar months then next after the date of the indenture, procure A. to accept a lease of the premises for the term of twenty-one years from Christmas Day, 1821; and that in case A. would not accept the lease, that he, defendant, would, within one calendar month next after the expiration of the said twenty-four calendar months, pay to the plaintiff a certain sum of money: it was held, that the deed took effect from the day of the date, and that A. not having accepted the lease, defendant was liable to pay the stipulated sum of money at the expiration of twenty-five calendar months from the date of the deed.

COVENANT upon an indenture dated the 24th of December, 1822, made between plaintiff and defendant, whereby, in consideration of 944*l.*, and certain covenants on the part of plaintiff to be performed, defendant leased to him a certain house and premises for ninety-seven years, subject to an agreement for an under-lease to one R. B. for twenty-one years. And defendant covenanted with plaintiff that he, defendant, should and would within the space of twenty-four calendar months then next after the date of the said indenture, cause and procure the said R. B., at his own expence, to accept and take a lease of the said premises *for the term of twenty-one years from Christmas Day, 1821, determinable, &c., at the net yearly rent of, &c., and to execute and deliver a counterpart thereof. And further, that in case the said R. B. would not accept and take the said lease upon the terms aforesaid, that then the said defendant should and would, within one calendar month next after the end and expiration of the said twenty-four calendar months, repay to plaintiff for his absolute use 72*l.* 16*s.* 4*d.* Breach, that the defendant did not within the space of twenty-four calendar

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† Cp. *Steele v. Mart*, p. 256 above.

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months after the date of the said indenture (and which said twenty-four calendar months had long since elapsed,) cause or procure the said R. B. to accept and take, nor did, nor would the said R. B. accept or take a lease of the said premises for the term of twenty-one years from, &c., at the yearly rent, &c.; nor did nor would the said defendant cause or procure R. B. to execute and deliver a counterpart thereof. And although by means of the said several premises, and according to the indenture defendant became liable to repay to plaintiff, within one calendar month next after the expiration of the said twenty-four calendar months, the said sum of 72*l.* 16*s.* 4*d.*, yet defendant did not repay it, (although one calendar month from, &c., had long since expired). Plea, that the said indenture was, in fact, executed and delivered long after the time on which it bears date, to wit, on the 8th of April, 1823, and that at the time of exhibiting the bill of the plaintiff against the defendant, twenty-five calendar months had not elapsed from the execution of the indenture. Demurrer and joinder.

Chitty, in support of the demurrer, was stopped by the Court.

[910]

Dodd, contra :

The question to be decided is, whether the time within which R. B. was to accept the underlease, was to be computed from the date or the delivery of the lease to the plaintiff. It must be computed from the delivery. The word "date" means the time when a certain event happens; the event to be recorded in this case was the execution of the deed, and in order to facilitate the ascertaining of the time when a deed was executed, it has been usual to mark a date upon the instrument: 2 Bl. Com. 304. In Co. Litt. 46 b, n. 8, it is said, "A. on the 2nd of August, 1 Jam., makes an obligation to B., and afterwards, on the same day, B. releases all actions *usque datum scripti*; the obligation is discharged, because date is delivery." So also in note 9 to the same page of Co. Litt., "Lease by indenture of 25th March, 15 Car., to have and to hold from and after the day of the date of these presents for the term and time of seven years from henceforth next and immediately ensuing, shall commence in

computation from the delivery, and in point of interest from the date;" and in *Pugh v. Duke of Leeds*,† Lord MANSFIELD uses language of a similar import. The party is not concluded by the date marked on the deed, but may shew that it was delivered at another time: *Oshey v. Hicks*,‡ *Hall v. Cazenove*.§ At all events, it may fairly be supposed in this case that the computation was to be made from the delivery; for the defendant's covenant was to procure the acceptance of a lease by R. B. within twenty-four months then next after the date. The words "then next" refer to the time of the execution of the deed. Suppose the deed had not been executed till more than twenty-four months *after the date, it could not have been contended that the defendant was immediately on the execution of it liable to an action for a breach of covenant, yet that would be the case if the computation were made from the date.

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[*911]

BAYLEY, J. :

The question in this case is simply as to the construction to be put upon the words of this deed. A deed has no operation until delivery, and there may be cases in which, *ut res valeat*, it is necessary to construe date, delivery. When there is no date, or an impossible date, that word must mean delivery. But where there is a sensible date, that word in other parts of the deed means the day of the date, and not of the delivery. This distinction is noticed in Co. Litt. 46 b, where it is said, "If a lease be made by indenture, bearing date 26th May, to hold, &c., for twenty-one years from the date, or from the day of the date, it shall begin on the 27th day of May. If the lease bears date the 26th of May to have, &c., from the making hereof, or from henceforth, it shall begin on the day on which it is delivered, &c." And afterwards it is said, "if an indenture of lease bear date which is void, or impossible, as the 30th of February, &c., if in this case the term be limited to begin from the date, it shall begin from the delivery, as if there had been no date at all." In *Arnitt v. Bream*|| it is said, "If the award had no date, it must be computed from the delivery, and that is one sense of

† Cowp. 714.

‡ Cro. Jac. 263.

§ 7 R. R. 611 (4 East, 477).

|| 2 Ld. Ray. 1082.

STYLES *datus.*" The question here is, what in this covenant is the
 WARDLE meaning of *datus*? I consider that a party executing a deed
 [*912] agrees that the day therein-mentioned shall be the date for
 purposes of computation. It would be very dangerous to allow a
 different *construction of the word "date," for then if a lease
 were executed on the 30th March to hold from the date, that
 being the 25th, and the tenant were to enter and hold as if from
 that day, yet, after the expiration of the lease, he might defeat
 an ejectment on the ground that the lease was executed on a day
 subsequent to the 25th of March, and that he did not hold from
 that day. All the authorities give a definite meaning to the
 word "date" in general, but shew that it may have a different
 meaning when that is necessary *ut res valeat*. It has been said
 that the computation could not have been intended to be made
 from the date if the twenty-four months had elapsed before the
 execution of the deed. That may be true, for then the intention
 of the parties, that the computation should not be made from
 the date would have been apparent. Here the meaning of the
 deed is plain, and according to that a breach of covenant was
 committed before the commencement of the action. The plea is
 therefore bad.

HOLROYD, J. concurred.

Judgment for the plaintiff.†

† Littledale, J. was absent on the winter circuit.

JOHNSTONE v. HUDLESTONE, CLERK, AND ANOTHER.

1825.

(4 Barn. & Cress. 922—940; S. C. 7 Dowl. & Ry. 411; 4 L. J. K. B. 71.)

[922]

A tenant held under a demise from the 26th day of March for one year then next ensuing, and fully to be complete and ended, and so from year to year, for so long as the landlord and tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord less than six months before the 25th day of March, that he would quit on that day, and the landlord accepted and assented to the notice: Held, on demurrer in replevin, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law, within the meaning of the Statute of Frauds.

Held, secondly, that the tenant having holden over after the expiration of the time mentioned in the notice to quit, the landlord was not entitled to distrain for double rent under the statute 11 Geo. II. c. 19, s. 18, inasmuch as that statute applied to those cases only where the tenant had the power of determining his tenancy by a notice, and where he actually gave a valid notice sufficient to determine it.

DECLARATION in replevin. Avowry that before and at the time of making the demise thereafter mentioned, and before and at the said time when, &c. the defendant Hudlestone was seised in his demesne as of fee of and in the tenements and premises demised, of which the dwelling-house and out-house in which, &c., was part and parcel, and being so seised theretofore and before the said time when, &c., to wit, on the 24th March, 1821, at, &c., demised to the plaintiff certain tenements and premises of which the said dwelling-house *and out-house was part and parcel, to hold the same to the plaintiff from the 26th March inclusive then next, for one year then next ensuing, and fully to be complete and ended, and so from year to year for so long time as the defendant and the plaintiff should respectively please, at the rent or sum of 52*l.* 10*s.* payable half-yearly, on the 29th September and 25th March in every year. By virtue of which demise the plaintiff on the 24th March, 1821, entered into and upon the said demised tenements and premises, and was possessed thereof. And being so possessed, before the 25th of March, 1824, to wit, on the 19th December, 1823, at, &c. gave the defendant, H., notice that he, plaintiff, would quit and deliver up possession of the demised tenements so by him holden as aforesaid, on the said 25th day of March, 1824, and the defendants in fact say,

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that the plaintiff did not, nor would on the day and year last aforesaid, quit or deliver up possession of the said demised tenements and premises pursuant to the notice, but refused so to do, and held over and continued in possession of the demised tenements and premises from the day and year last aforesaid, until the said time when, &c., whereby the plaintiff became liable to pay to the defendant H., during the time he so continued in possession after the 25th March, 1824, as aforesaid, the yearly rent or sum of 105*l.*, being at the rate of double the rent or sum which the plaintiff would otherwise have paid in case the said notice had not been so given. And because the sum of 52*l.* 10*s.* of the said rent or sum of 105*l.* for one half year next before and ending on the 29th of September, 1824, and from thence, until, and at the said time when, &c., was due, &c., in arrear from the plaintiff to the defendant, H., he in his own right, well avowed, *and the other defendant, as his bailiff, acknowledged the taking of the goods and chattels as a distress. Plea in Bar, that the said notice so given by the plaintiff to the defendant H., was given less than six months before the 25th day of March, 1824, that is to say, three months and six days only before the said 25th day of March, 1824, to wit, on the said 19th day of December, 1823, and that the said notice was not in writing, and this, &c. Replication, that though true it is that the said notice so given by the plaintiff to the defendant was given less than six months before the 25th day of March, 1824, and that the said notice was not in writing; nevertheless, for replication the defendants say that the said demise in that avowry and cognizance mentioned was not created by deed, but was and is a parol demise, and that the said defendant, Hudlestone, accepted the said notice to quit, so given by the plaintiff to the defendant as aforesaid, and recognized, assented to, and adopted the same. Demurrer and joinder.

Patteson, in support of the demurrer :

The question in this case is, whether the landlord, who is the defendant in replevin, is entitled to distrain for double rent under the statute 11 Geo. II. c. 19, s. 18, the tenancy not having been determined by half a year's notice to quit. The

notice given by the tenant, that he would quit at the end of three calendar months, of itself is clearly not sufficient to determine a tenancy from year to year. But the question raised by the pleadings is, whether the acceptances and assent to the notice to quit by the landlord made it binding on the tenant to quit at the time mentioned in the notice, so as to entitle the landlord to distrain for double rent. Now it is clear that half a year's notice to quit is necessary in order to determine a *tenancy from year to year, but it will be argued that the assent of the landlord to the notice to quit made it operate as a present surrender of the tenant's interest. At the time when that notice was given, the tenant had a subsisting term in the premises, and then by the Statute of Frauds that term could not be surrendered, except by note in writing, or by act and operation of law: *Mollett v. Brayne*.† The notice to quit, unless it were binding on the tenant at the time when it was given, was no more than a proposal on the part of the tenant to quit at a given period, which the landlord might or might not agree to. If the landlord did assent to it immediately, it would then operate as an agreement between the landlord and tenant that the latter should yield up his interest at a given period, but a surrender is an actual yielding up of an estate for life or year to him that hath an immediate estate and reversion. It would be directly contrary to the intention of the parties to construe the agreement in this case as a surrender at the time when the notice to quit was given; and when it expired the tenant refused to yield up his interest. But assuming that such an agreement might operate as a surrender, either at the time when the notice to quit was given, or when it expired, it would so operate, not by act and operation of law, but by reason of the agreement of the parties; and the Statute of Frauds then requires that such a surrender should be in writing. This is distinguishable from *Thomas v. Cook*,‡ because, in that case, there was an actual change of possession. Besides, the Court of Exchequer have decided upon this very notice in *Doe demise of Huddleston v. Johnstone*,§ that although *it was assented to by the landlord, that did not entitle

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† 11 R. R. 676 (2 Camp. 103).

§ M'Clel. & Y. 141.

‡ 20 R. R. 374 (2 B. & Ald. 119).

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him to maintain an ejectment. It appeared that after the landlord had accepted the offer, he gave notice that the estate would be let by auction on the 6th of January, 1824, and that Johnstone attended the letting, and offered a rent of 40*l.* a year, but another person offered 52*l.* a year, and was declared the tenant. Johnstone then proposed the same sum, but his proposal was rejected, and he refused to quit. It was contended that the tenant's offer to give up the possession at the end of the year, and the acceptance of that offer by the landlord followed by the reletting of the premises (which must be taken to have been with the tenant's consent) amounted to a surrender by act and operation of law, within the statute 29 Car. II. c. 3; and, secondly, that there was a mutual agreement to waive half a year's notice in writing, and adopt one by parol within that time; that the latter, therefore, was a reasonable notice, and that the law required nothing more; but it was held that the tenancy was not determined, there not having been either a sufficient notice to quit, or a surrender by operation of law.

Assuming, therefore, that the tenancy has not been determined, the question then is, whether the landlord is entitled to distrain for double rent under the statute 11 Geo. II. c. 19, s. 18, in consequence of the tenant's having given a notice to quit, which was not binding either upon him or the landlord. The mischiefs intended to be remedied are specified in the recital of that section. The object of the Legislature appears to have been to remedy the inconvenience resulting to landlords where tenants having power to determine leases by giving notice to quit, refuse to deliver up possession when the landlord *has agreed with another tenant. The statute, therefore, contemplates a case where a landlord is put to inconvenience in consequence of the tenant's giving a notice to quit, by which the tenant had power to determine his lease. Now the tenant in this case had no power to determine his tenancy by the notice which he gave, and that must have been known to the landlord, and, therefore, he could not sustain the inconvenience contemplated by the statute. This, therefore, was not a case within the mischiefs intended to be remedied. It is true that the

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enacting words of the section are larger and sufficient to comprehend the present case, but they must be construed together with the words of the recital, and effect must be given to all the words of the section: The enacting words are "that in case the tenant give notice of his intention to quit at a time mentioned in the notice, and does not deliver up possession, then he shall pay double rent." Now construing these words with reference to the mischief to be remedied, viz., the inconvenience resulting to landlords in consequence of tenants who have power to determine their leases by giving notice to quit, refusing to deliver up possession when the landlord has agreed with another tenant; the notice of the intention to quit, mentioned in the enacting part, must be a notice by the giving of which the tenant has power to determine his tenancy.

There is no authority to shew that a tenant is liable to double rent where his tenancy has not been duly determined by a valid notice to quit. In *Timmins v. Rawlinson*,† it was decided, that a lease by parol was a *holding over within the statute, and that a parol notice to quit by the tenant was sufficient to make him liable for double rent in case he held over; and although the notice there was to quit at the end of three months, no question was made as to the validity of the notice in that respect. *Messenger v. Armstrong*‡ is not in point, because that was an action for double the yearly value after notice given by the landlord, as appears by Selwyn's N. P. 712, n. In *Farrance v. Elkington*,§ a tenant, from year to year, gave his landlord notice to quit as soon as he got another situation, but did not quit, and Lord ELLENBOROUGH held that he was not liable for double rent, and he intimated an opinion that the notice must be one binding upon the landlord. The statute 4 Geo. II. c. 28, applies in terms to those cases only where the tenant holds over after the determination of his term. The statute 11 Geo. II. c. 19, s. 18, is a statute *in pari materia*, and ought to be construed with reference to the enactments of the former statute. The former statute gives the landlord double the yearly value, if the tenant holds over after a notice to quit given by the landlord. The

[*928]

† 3 Burr. 1603.

§ 11 B. R. 807 (2 Camp. 591).

‡ 1 B. R. 148 (1 T. R. 53).

JOHNSTONE latter statute gives double the yearly rent, if he holds over after
 r.
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 STONE.

Parke, contra :

[*929]

It does not appear by the allegation in the plea that the notice to quit was not a notice to quit at the end of half a year. The allegation is, that the notice was given less than six months before the 25th March, 1824. But that may mean calendar months, *and if so, there might be more than half a year's notice; and *Doe v. Green*† is an authority to shew that a notice for less than six calendar months is sufficient. But, assuming that it does sufficiently appear that less than half a year's notice was given, still that notice having been accepted and assented to by the landlord, was sufficient to determine the tenancy on two grounds; first, because the parties agreed to consider it a reasonable notice to quit; secondly, because it operated as a surrender by operation of law. But assuming that the tenancy was not determined, still the tenant having held over after having given a notice to quit, the landlord was entitled to distrain for double rent. At all events he is entitled to recover the single rent. As to the first point, the parol notice to quit in less than half a year having been accepted and assented to by the landlord, is sufficient not to destroy the tenant's then subsisting term for the current year, but to prevent the commencement of a new term, which otherwise would commence at the beginning of the following year. The interest of the tenant in the premises for the current year could only be determined by a surrender in writing, but it does not therefore follow that a new interest for a second year may not be prevented from commencing, by a notice which both parties have agreed to consider reasonable. The nature of a tenancy from year to year is thus explained by Lord MANSFIELD, in *Right v. Darby*.‡ “If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract. They are supposed to have renewed the old agreement, which was to hold for a year. But *then it is necessary, for the sake

[*930]

† 4 Esp. 198.

‡ 1 R. R. 169 (1 T. R. 159).

of convenience, that if either party should be inclined to change his mind, he should give the other half a year's notice before the expiration of the next or any following year." In order to determine a tenancy from year to year, the law requires only that a reasonable notice should be given.† Generally speaking, half a year's notice is deemed reasonable, but it is competent to parties to agree to determine the tenancy upon a shorter notice, and here they have so done. *Shirley v. Newman*‡ is expressly in point. There three months' notice only was given, and the lessor neither expressed assent nor dissent, but he took the rent up to the time when the defendant quitted; and Lord KENYON held, that this was a waiver of a regular notice to quit, and an acquiescence on the part of the lessor. He said, that "in the case of a tenancy from year to year, no notice short of six months, and determinable with the year, was sufficient, but that by agreement the parties might dispense with the notice, and the acquiescence of the parties was presumptive evidence of such agreement." Secondly, in this case there was a surrender by operation of law. In the cases referred to on the other side, the notices given were to quit in the middle of the current year. But the tenant, having an existing interest at that time, could not surrender it except by notice in writing. This observation applies to *Thomson v. Wilson*§ and *Mollett v. Brayne*.|| It is to be observed, however, that in *Whitehead v. Clifford*¶ GIBBS, Ch. J. said, that it might be proper to consider the latter case when the like *circumstances should arise. Suppose that the landlord and tenant had agreed at Christmas that the landlord should demise to the tenant for a quarter of a year, and that the tenant had accepted that demise, that would have operated as a surrender of the former term. Now here the notice given by the tenant, and accepted by the landlord, in point of legal effect, operated as a new demise from the landlord to the tenant for a quarter of a year from Christmas to Lady Day, and, consequently, as a surrender of the former term. *Thomas v. Cook* is expressly in point.

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[*931]

+ Per WILMOT, J., *Timmins v. Rawlinson*, 3 Burr. 1609.

† 5 R. B. 737 (1 Esp. 266).

§ 20 R. R. 696 (2 Stark. 379).

|| 11 R. R. 676 (2 Camp. 103).

¶ 15 R. R. 579 (5 Taunt. 518).

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But assuming that the tenancy was not determined, still the tenant having given the landlord a notice to quit, and not having quitted in pursuance of it, was liable under the stat. 11 Geo. II. c. 19, s. 18, to pay double rent; for here the tenant had the power to determine the tenancy, he gave the notice, and refused to deliver up the possession. It is a case, therefore, within the very words of the enacting part of the section, and this statute must be construed by itself, and not with reference to the enactments in the statute 4 Geo. II. c. 28. There is a material distinction between the two statutes. The statute 4 Geo. II. c. 28, requires that there should be a demand of possession, and a notice in writing by the landlord. The statute 11 Geo. II. c. 19, s. 18, requires no such thing; and it recognizes the party by the name of tenant, which the first statute does not. The latter statute also gives the landlord a right to *distrain* for double rent, which is a remedy applicable only to the relation of landlord and tenant. It therefore contemplates a continuance of the tenancy after the time when the notice to quit has expired. At all events, the defendant is entitled to the single rent; for it appears that the plaintiff continued *to hold as tenant after an insufficient notice to quit had been given; and the defendant may recover a part of the entire sum which he claims.

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BAYLEY, J.:

I am of opinion, that the notice to quit in this case was not sufficient to determine the tenancy from year to year, so as to enable the landlord to maintain an ejectment or to distrain for double rent under the statute of the 11 Geo. II. c. 19, s. 18, and I am also of opinion that he is not, under this avowry, entitled to claim the single rent. The original tenancy is averred in the avowry to be not a tenancy for a year only, but from the 26th of March for one year fully to be complete and ended, and so on from year to year for so long time as the plaintiff and defendant shall respectively please. So that as soon as the last half year of each year had commenced, the tenant had an interest in the premises for one year and a half. The term, therefore, was to have continuance until some act were done to determine the tenancy. Now, the law requires that there must be half a year's

notice to quit in order to determine such a tenancy. It has been contended, that the allegation in the plea that the notice was given less than six months before the 25th March, 1824, may be taken to mean that it was given less than six calendar months, and therefore that it may have been given more than half a year. But in legal proceedings, the word "months" means lunar months,† unless the contrary appear to be the meaning from the subject-matter to which that term is applied. Six lunar months must necessarily be less than half a year, and, therefore, there has not been the notice required by law to determine the tenancy. At the time when this notice was given the tenant had an interest for a year or more in the *land; and that could not be put an end to by a parol notice to quit at the expiration of three months. The Statute of Frauds, 29 Car. II. c. 3, s. 3, says "that no leases or estates, or interests either of freehold or terms of years, or any uncertain interests in any lands, tenements, or hereditaments shall be surrendered, unless it be by deed or note in writing, or by act and operation of law." It is said that although a parol notice to quit at the end of three months may not of itself be sufficient to determine a tenancy from year to year, yet that such notice having been given by the tenant, and accepted by the landlord, may operate as a surrender of the residue of the term by operation of law. And *Thomas v. Cook*‡ has been relied upon as an authority in point. There Thomas had let a house to Cook as tenant from year to year; Cook underlet to one Perks, an under-tenant, commencing at Christmas, 1816, and at Lady Day, 1817, distrained upon the under-tenant for rent. Rent then being due from Cook to Thomas, he gave notice to the under-tenant not to pay the rent to Cook; and upon the latter's refusing to take the under-tenant's bill for the amount due, Thomas agreed to take it himself in payment of the rent due from Cook to him, saying that he would not have anything further to do with Cook; and afterwards, in October, 1817, Thomas himself distrained the goods of Perks for rent in arrear. Now in that case there was not only a declaration by the original landlord that he would no longer consider Cook as

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† This point of construction is now altered by the Interpretation Act, 1889.—R. C.
‡ 20 R. R. 374 (2 B. & Ald. 119).

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his tenant, but there was an acceptance by him of another person as his tenant, and that acceptance was assented to by Cook. The original tenant was not only willing to yield up his interest in the premises, but *the landlord was willing to accept it; and he did accept, for he treated Perks as his tenant, thereby shewing that he considered the old term as at an end. The possession of the premises had been previously transferred to the under-tenant. That case, therefore, only decided that where there had been a change of possession, and an agreement between the landlord and tenant that the former should accept the person in possession as his tenant from a given period, the law in order to effectuate the intention of the parties, would work a surrender of the original tenant's interest in the same way as it does when a lessee for a term of years, during the term, accepts from the lessor a new lease. In that case, as the second lease cannot be good unless there was a previous surrender of the first, and as the lessee by accepting the second lease admits the ability of the lessor to demise, the law, in order to effectuate the intention of the parties, that the second lease shall take effect, works a surrender of the first. In this case the tenant remained in possession of the premises, and no act was done by the landlord to shew that he considered the old term to be at an end. It is said that the landlord adopted the notice to quit; but assuming that the assent of the landlord to such a notice would in any case be sufficient to make it binding upon him, it ought to be shewn that notice of that assent was given to the tenant. For until that assent was notified to the tenant, the notice to quit was no more than a proposal made by the latter to quit at a certain time; by law he could not compel the landlord to accept. I am of opinion, however, that even if it had appeared upon the face of the pleadings that the landlord had assented by parol to accept the possession of the premises at the time mentioned in this *notice to quit, it would not have been such an acceptance of that notice to quit by the landlord as would have operated as a surrender of the tenant's interest. The notice given by the tenant being one which the landlord might treat as a nullity, it would continue inoperative until the landlord assented to it. When that assent was given, the effect of it would be to make

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the notice to quit operate as an agreement between the parties that the tenant should yield up his interest at the time mentioned in the notice. Assuming that the assent by the landlord to such a notice may make it operate as a surrender of the tenant's interest, (upon which I give no opinion,) it must operate as an actual surrender, by reason of the agreement of the parties, and not as a surrender by operation of law. But the Statute of Frauds requires that such a surrender should be by note in writing. I think, therefore, that if the landlord was willing, and intended to accept this notice to quit, he ought, in order to have made it binding on himself and on the tenant, to have expressed that assent in writing. Not having bound himself by an assent in writing to treat it as such, I think the tenant was not bound to quit at the time specified in this notice, so as to entitle the landlord to maintain an ejectment.

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Then the question is, whether, although the notice be not binding so as to entitle the landlord to bring ejectment, it is so far binding on the tenant as to make him liable to pay the double rent under the statute 11 Geo. II. c. 19, s. 18. I am of opinion that that statute was intended to give the landlord a remedy for double rent in those cases only where the tenant has given a notice binding upon him to quit at the expiration of the time specified in the notice, and upon which the landlord *might at that time have acted, and brought an ejectment. I think that the Legislature did not intend to punish the tenant for his caprice, but to reimburse the landlord for any injury he might sustain by losing his bargain with a new tenant. The 18th section of the statute recites, "That whereas great inconveniences have happened, and may happen to landlords whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession, when the landlord hath agreed with another tenant for the same." Now what inconvenience can result to a landlord from receiving a notice to quit in which he is not bound to acquiesce? The law does not warrant him to expect that the tenant will quit at the expiration of the time mentioned in such notice. Where tenants have power to determine their tenancy by giving a notice to quit, they are bound, in order to determine

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the tenancy, to give such a notice as the law requires, and if a landlord, without such a notice, agrees to let his lands to another tenant, he does it at his own peril. It is true that the enacting words are carried beyond the recital, but I think that effect must be given to all the words of the clause, and that the enacting words must be construed with reference to the mischief intended to be remedied. The enacting words are, "That in case any tenant shall give notice of his intention to quit the premises by him holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant, his executors, &c., shall from thenceforward pay to the landlord double the rent or sum which he should otherwise have paid." The fair construction of that clause appears to be, that it shall only apply in case *the tenant shall give the notice contemplated in the preamble, viz., such a notice as the tenant has power to give in order to determine the tenancy, and so as to make it binding on the landlord to accept possession of the premises. If that were not so, the consequence would be, that if a tenant, having twenty-one years by lease, gave notice that he would quit at the end of the first year of the term, he would be liable to pay double rent from that period, although the landlord could not, in contemplation of law, be injured by receiving a notice which he was not bound to act upon. It is supposed that the case of *Timmins v. Rawlinson*† has established that a notice to quit, given less than half a year before the expiration of the time mentioned in such notice, is sufficient to entitle a landlord to maintain an action for double rent, but such a conclusion is not fairly to be deduced from that case. There the lease was not alleged to be from year to year, but for one year only, and if that be so, then the tenant was bound to quit at the end of that year, without any notice whatever. The only case which raises any degree of doubt upon the question is that of *Shirley v. Newman*.‡ In that case Lord KENYON seems to have thought that an agreement by the landlord to accept less than half a year's notice was sufficient to put an end to the tenancy; but the question upon the Statute of Frauds was not presented to his attention. There is also this

† 3 Burr. 1603.

‡ 5 B. R. 737 (1 Esp. 266).

essential difference between that case and this, that there the tenant had actually quitted possession of the premises. Upon the whole, therefore, I am of opinion that the interest of the tenant not having been *determined by a valid notice to quit, and there being no surrender in writing, or by act and operation of law, within the Statute of Frauds, the landlord was not entitled either to bring an ejectment, or to recover double rent.

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Then it is said that the defendant is entitled under this avowry to claim the single rent. It is true that if a defendant in replevin claims more than is due to him, he may recover what is due, provided that be part and parcel of that which he claims by his avowry. Here the defendant claims by his avowry double rent, which became due to him under the statute 11 Geo. II. c. 19, s. 18, in consequence of his tenant's having holden over after having given a notice to quit. I think he may recover under the avowry any part of the double rent claimed; but that he cannot recover any single rent due to him by virtue of a contract made between him and his tenant, because such single rent does not constitute part and parcel of the rent which he claims to be due to him under the statute.

HOLROYD, J. :

I am of opinion that the claim for double rent cannot be supported; and that the defendant cannot recover the single rent under this avowry. The landlord does not claim the rent as due to him under a demise, but under the statute. In common cases where a landlord seeks to recover rent due to him under a contract, he may recover less than the sum which he claims, but in that case the sum which he does recover is part of the sum which he claims to be due by virtue of the contract. Here the landlord claims rent under the statute, and treats the tenant as a tortfeasor, by reason of his holding over after *the expiration of the time mentioned in the notice to quit. I think he may, under the avowry, recover any part of the double rent which is due to him under the statute, but that he cannot recover any part of the single rent which is due to him under a contract. I think also that the notice to quit mentioned in the pleadings must be taken to be a notice for less than half a year, and that it was

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not, therefore, sufficient to determine a tenancy from year to year. The notice not having been given so much as half a year before the expiration of the current year, at the time when it was given another interest had vested in the tenant to continue for the remainder of that and the whole of the following year. This notice was not binding, therefore, on the landlord or tenant, so as to enable the former to maintain ejectment. If an *actual* surrender of the tenant's interest were necessary in order to determine the tenancy, it is perfectly clear that such a surrender must be in writing. I am of opinion that there was not in this case any surrender by operation of law, because the tenant never yielded up the possession of the premises to the landlord, or to any person on his behalf. If, besides an agreement between the landlord and tenant, that the interest of the latter should be yielded up to the former at a particular period, there had also been an actual yielding up of the possession to another person, the law in that case might have worked a surrender. But then it would work such a surrender, not by reason of the agreement of the parties alone, but by reason of that agreement coupled with the change of possession. In *Thomas v. Cook*[†] the tenant had yielded up possession *of the premises to another person, and with his assent the landlord accepted that person as his tenant. But in this case there is only an agreement between the parties that the possession shall be delivered up. Now it would be directly contrary to the Statute of Frauds, to hold that such an agreement, not in writing, should take effect as a surrender. I have great difficulty in saying that there was any such agreement binding on the tenant. There could be no such agreement until the assent of the landlord to the notice to quit was made known to the tenant. Now it is not alleged that that assent was ever notified to the tenant; nor does it appear *when* the assent was ever given; it may not have been given until after the time mentioned in the notice to quit had expired, and if so there never was any agreement binding upon the tenant to deliver up the possession. But assuming that the assent of the landlord was given and notified to the tenant so that the legal effect of it might be to make it operate as a surrender, it could only operate

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† 20 R. R. 374 (2 B. & Ald. 119).

as an actual surrender; and in order to make it so operate it ought to have been shewn that the assent of the landlord to the notice to quit was in writing. I am, therefore, of opinion that, notwithstanding the acceptance of the notice to quit by the landlord, the tenant, in point of law, was entitled to hold for another year, and that being so entitled to hold for another year, he was not liable to pay double rent. The statute 11 Geo. II. c. 19, s. 18, applies only to cases where he has the power to give a valid notice to quit binding upon him and the landlord at the time when it is given.

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Judgment for the plaintiff.

**BLOXAM AND WARRINGTON, ASSIGNEES OF SAXBY,
A BANKRUPT, v. SANDERS AND OTHERS.†**

1825.

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(4 Barn. & Cress. 941—953; S. C. 7 Dowl. & Ry. 407.)

A., a hop-merchant, on several days in August, sold to B., by contract, various parcels of hops. Part of them were weighed and an account of the weights, together with samples, delivered to the vendee. The usual time of payment in the trade was the second Saturday subsequent to the purchase. B. did not pay for the hops at the usual time, whereupon A. gave notice that unless they were paid for by a certain day they would be re-sold. The hops were not paid for, and A. re-sold a part, with the consent of B., who afterwards became bankrupt, and then A. sold the residue of the hops without the assent of B. or his assignees. Account sales of the hops so sold were delivered to B., in which he was charged warehouse rent from the 30th of August. The assignees of B. demanded the hops of A. and tendered the warehouse rent, charges, &c.; and, A. having refused to deliver them, brought trover. The jury found that defendant had not rescinded the contract of sale: Held, that the assignees were not entitled to maintain trover to recover the value of the hops, inasmuch as in order to maintain that action, the party must have not only a right of property but a right of possession, and that although a vendee of goods acquires a right of property by the contract of sale, yet he does not acquire a right of possession to the goods until he pays or tenders the price.

TROVER to recover the value of a quantity of hops from the defendants. At the trial before Abbott, Ch. J. at the London

† The judgment of Mr. Justice BAYLEY has been generally recognised as a leading authority as to the rights of the unpaid vendor. See in particular *Grice v. Richardson*

(P. C. 1877) 3 App. Cas. 319, 322; 47 L. J. P. C. 48, 50. And see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71, s. 39), s. 48 (2).—B. C.

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sittings, after last Trinity Term, the jury found a verdict for the plaintiffs, damages 3,000*l.*, subject to the opinion of this Court upon the following case :

The plaintiffs were assignees of J. R. Saxby, a bankrupt under a commission of bankrupt duly issued against him on the 5th January, 1824. The act of bankruptcy was committed on the 1st November, 1823, the bankrupt having on that day surrendered himself to prison, where he lay more than two months. The defendants were hop factors and merchants in the borough of Southwark. Previous to his bankruptcy the bankrupt had been a dealer in hops, and on the 7th, 16th, and 23rd August purchased from the defendants the hops (among others) for which this action was brought. Bought notes were delivered in the following form: "Mr. John Robert Saxby, of Sanders, Parkes & Co. T. M. Simmons, eight pockets at 155*s.* 8th August, 1823." Part of the hops were weighed, and an account of the weights was delivered to Saxby by the defendants. The samples were given to the bankrupt, and bills of parcels were also delivered to him in which he was *made debtor for six different parcels of hops, the amount of which was 739*l.*

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The usual time of payment in the trade was the second Saturday subsequent to a purchase. Part of the hops belonged to the defendants, and part they sold as factors, but they sold all in their own names, it being the custom in the hop trade to do so. It was proved that the bankrupt had said more than once that the hops were to remain in the defendants' hands till paid for, and that he said so when he was about buying one of the parcels of hops for which the action was brought. The bankrupt did not pay for the hops, and on the 6th September, 1823, the defendants wrote to the bankrupt, and desired him to "take notice, that unless he paid for the hops they had sold him, on or before Tuesday then next, the defendants would proceed to resell them, holding him accountable for any loss which might arise in consequence thereof." Before the bankruptcy the defendants did not sell any parcel of hops without the bankrupt's express assent. After the notice already stated the defendants sold some parcels of the hops, but in one instance the bankrupt refused to allow the defendants to sell a parcel of hops to a

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person named by them at the price offered, and that parcel was accordingly sold by the defendants, before Saxby's bankruptcy, to another person by Saxby's authority. On another occasion in the month of September the bankrupt had employed a broker to sell another parcel of the hops, but the defendants refused to deliver them without being paid for them. After the act of bankruptcy the defendants sold hops of the bankrupt's to the amount of 380*l.* 1*s.* 5*d.* The defendants delivered account sales of the hops so sold by them after the bankruptcy. The hops were *stated to be sold for Saxby, and he was charged warehouse rent from the 30th August, and also commission on the sales. Besides the hops purchased from the defendants, the bankrupt placed in their warehouse nineteen pockets of hops for sale by them (as factors), of which fifteen pockets were sold on and after the 13th of January, 1824, of the value of 77*l.* 1*s.* 5*d.*, and of which four remained in their warehouse at the time of the trial, which four were of the value of 14*l.*, and there were also unsold of the hops purchased from defendants seven bags, fifty-six pockets, of the value of 251*l.* 1*s.* 6*d.* There was a demand by plaintiffs of these hops, and a tender of warehouse rent and charges, and a refusal on the part of the defendants to deliver them, before action brought. The jury found that the defendants did not rescind the sales made by them to the bankrupt. This case was argued at the sittings before last Term, by

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Evans, for the plaintiffs :

The assignees are entitled to recover the full value of all the hops. As to the nineteen pockets which were the property of the bankrupt, and which the defendants held as factors, there is no pretence for saying that the assignees are not entitled to recover the full value of them. As to the remainder, they were sold by the defendants to the bankrupt upon credit, to be paid for according to the usage of the trade, on the second Saturday after the sale. The property in the goods vested by the sale immediately in the bankrupt. In Comyn's Digest, tit. Agreement, B. 3, it is laid down, "If a man agree for goods at such a price, the bargain shall be void if the money be not paid immediately. For in every bargain *payment ought to be made

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upon the delivery of the goods, except where a future day is agreed upon for the payment." And "If a sale be of goods for such a price, and a day of payment limited, the contract will be good, and the property altered by the sale, though the money be not paid." Dyer, 30 a, and other authorities are cited. *Rugg v. Minett*† and *Hanson v. Meyer*‡ are authorities to the same effect. The hops remained in the defendant's warehouse, but the bankrupt was charged warehouse rent from the 30th of August. From that time, therefore, the hops must be considered as much in his possession as if he had removed them to his own premises: *Hurry v. Mangles*,§ *Harman v. Anderson*.¶ Then looking at the written contract only, the plaintiffs having the right of property and the right of possession at the time of the sale by the defendants, are entitled to recover in trover the full value of the goods sold. But it will be said that although the contract, on the face of it, purports that the hops are to be delivered immediately, the parol evidence was admissible to shew that they were not to be delivered until paid for. That would have the effect of varying the written contract, and therefore was not admissible.

(BAYLEY, J.: There is nothing on the face of the contract to shew that the hops were sold on credit.)

It was the general usage of the trade, and might therefore be proved by parol, although not expressed in the written contract: *Charleton v. Cotesworth*,¶ *Uhde v. Walters*,†† *Gabay v. Lloyd*,‡‡ *Palmer v. Blackburn*,§§ *Meres v. Ansell*,||. *Hughes v. Statham*.¶¶

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(BAYLEY, J.: If parol evidence of the usage was admissible, why were not the declarations of the bankrupt admissible to shew that the hops were not to be taken away until paid for?)

The rule as to giving parol evidence of the usage of trade does not apply to that, but assuming that the defendants once had a

† 10 B. R. 475 (11 East, 210).

‡ 8 R. R. 572 (6 East, 614).

§ 10 R. R. 727 (1 Camp. 452).

|| 11 R. R. 706 (2 Camp. 243).

¶¶ 27 R. R. 741 (Ry. & M. 175).

†† 13 R. R. 737 (3 Camp. 16).

‡‡ 27 B. R. 486 (3 B. & C. 793).

§§ 25 B. R. 599 (1 Bing. 61).

||| 3 Wils. 275.

¶¶¶ 4 B. & C. 187.

lien, it arose by special agreement, and was destroyed by the sale; they are therefore liable to account to the assignees: *Parry v. Dawson*,† *Sweet v. Pym*.‡

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(LITLEDALE, J. : In *Langfort v. Tiler*§ *HOLT*, Ch. J. says, “that after earnest given the vendor cannot sell the goods to another without a default in the vendee; and therefore if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person.”)

Here the jury have found that the contract was not rescinded, the defendants therefore had at most but a strict lien; and having wrongfully sold the goods, they are liable to pay the full value in this action, and must treat the price as a debt due from the bankrupt. [This point was elaborately argued, but the COURT pronounced no opinion upon it. *M'Combie v. Davis*,^{||} *Solly v. Rathbone*,¶ and *Graham v. Dyster*†† were cited.]

Abraham, contra :

It must be admitted that the plaintiffs are entitled to recover the value of the nineteen pockets of hops which the defendants had in their possession *as factors. As to the others, the vendee having become insolvent, the vendors were entitled to stop them before they got into the actual possession of the vendee, and the latter had no right to the possession until he paid the price. Secondly, parol evidence was admissible to shew that the goods were not to be delivered until the price was paid, inasmuch as it did not contradict the written agreement, but was merely an answer to that which was sought to be added to it by parol: *Wiglesworth v. Dallison*,‡‡ *Senior v. Armytage*.§§ At all events the plaintiff not having paid the price, can recover only nominal damages.

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Cur. adv. vult.

† 3 Anstr. 710.

‡ 5 R. B. 497 (1 East, 4).

§ 1 Salk. 113.

|| 8 R. B. 534 (6 East, 538, 7 East, 5).

¶ 2 M. & S. 298.

†† 6 M. & S. 1.

‡‡ Doug. 201.

§§ 17 R. B. 627 (Holt, 197).

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BAYLEY, J. now delivered the judgment of the COURT :

This was an action of trover for certain quantities of hops sold by the defendants to Saxby before his bankruptcy, and for certain other hops which Saxby had placed in defendants' warehouses that defendants in their character of factors might sell them for his use, and the question as to this latter parcel stands upon perfectly distinct grounds from the question as to the others. This parcel consisted of nineteen pockets; defendants sold none of them until after Saxby's bankruptcy, and then they sold fifteen pockets, not for the use of the assignees, but to apply the proceeds, not for any debt due to them in their character of factors, but to discharge a claim they considered themselves as having upon Saxby in regard to the other hops; and the other four pockets they refused to deliver to the assignees. It was candidly *admitted upon the argument, and was clear beyond all doubt, that the defendants were not warranted in applying the proceeds of the fifteen pockets to the purpose to which they attempted to apply them, and that they had no legal ground for withholding the four pockets; and, therefore, to the extent of these nineteen pockets, the value of which is 91*l.* 19*s.* 5*d.*, we think it clear that the plaintiffs are entitled to recover. The other quantities were hops Saxby had bargained to buy of the defendants on different days in August, 1823, and for which defendants had delivered bought notes to Saxby. The bought notes were in this form: "Mr. J. R. Saxby, of Sanders, Parkes, & Co., T. M. Simmons, eight pockets at 155*s.*, 8th August, 1823." Part of the hops were weighed, and an account delivered to Saxby of the weights, and samples were given to Saxby, and invoices delivered. The bought notes were silent as to the time for delivering the hops, and also as to the time for paying for them, but the usual time for paying for hops was proved to be the second Saturday after the purchase. It was also proved that Saxby had said that the hops were to remain with the defendants till they were paid for; but as the admissibility of such evidence was questioned, and in our view of the case it is unnecessary to decide that point, I only mention it to dismiss it. (The learned Judge then stated the other facts set out in the special case, and then proceeded as follows:) Under these

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circumstances the question is, whether in respect of these hops the plaintiffs are entitled to recover. It was urged, on the part of the plaintiffs, that the sale of these hops vested the property in them in Saxby; that the hops were to be considered as sold *upon credit, and that defendants had no lien therefore upon any of them for the price; that if they ever had any lien, it was destroyed as to those they sold by the act of sale, and that the plaintiffs were entitled to recover the full value of what were sold, without making any deduction for the price which was unpaid. It is, therefore, material to consider whether the property vested in Saxby to any and to what extent; and what were the respective rights of Saxby and of the defendants. Where goods are sold and nothing is said as to the time of the delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. The buyer's† right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part, and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession: *Tooke v. Hollingworth*.‡ Whether default in payment when *the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to enquire, because this is a case of

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† *Sic*: But the sense requires in Benjamin on Sale, 4th ed. 680.—
“seller's”: the correction is tacitly F. P.
made in the quotation of this passage † 2 R. R. 573 (5 T. R. 215).

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insolvency, and in case of insolvency the point seems to be perfectly clear: *Hanson v. Meyer*.† If the seller has dispatched the goods to the buyer, and insolvency occurs, he has a right in virtue of his original ownership to stop them *in transitu*: *Mason v. Lickbarrow*,‡ *Ellis v. Hunt*,§ *Hodgson v. Loy*,|| *Inglis and others v. Usherwood*,¶ *Bohtlingk v. Inglis*.†† Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has dispatched the goods, and whilst they are in transitu, *à fortiori*, is it when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if any thing unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights: *Gordon v. Harper*.‡‡ Trover is an action of that description, it requires right of property and right of possession to support it. And this is an answer to the argument upon the charge of warehouse rent, and the non-rescinding of the sale. If the defendants were forced to keep the hops in their warehouse longer than Saxby had a right to require them, they were entitled to charge him with that expence, but that charge gave him no better right of possession than he would have had if that charge had not been made. Indeed that charge was not made until after the bankruptcy, and until the defendants insisted that the right of possession was transferred to their second vendee. Then as to the non-rescinding of the sale, what can be its effect? It is nothing more than insisting that the defendants will not release Saxby

† 8 R. R. 572 (6 East, 614).

‡ 1 R. R. 425 (1 H. Bl. 357).

§ 1 R. R. 743 (3 T. R. 464).

|| 4 R. R. 483 (7 T. R. 440).

¶ 1 East, 515.

†† 7 R. R. 490 (3 East, 381).

‡‡ 4 R. R. 369 (7 T. R. 9).

from the obligation of his purchase, but it will give him no right beyond the right his purchase gave, and that is a right to have the possession on payment of the price. As that price has not been paid or tendered, we are of opinion that this action, which is not an action for special damage by a wrongful sale, but an action of trover cannot, as to those hops, be maintained. The verdict must, therefore, be for the plaintiffs for the sum of 91*l.* 19*s.* 5*d.* only.

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v.
SANDERS.

Judgment for the plaintiff.

BLOXAM AND ANOTHER, ASSIGNEES OF
SAXBY v. MORLEY.

1825.

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(4 Barn. & Cress. 951—953 ; S. C. 7 Dowl. & Ry. 407.)

THIS was also an action of trover brought by the same plaintiffs to recover the value of other hops sold by the defendant to the plaintiffs under circumstances nearly similar to those in the last case, which it is unnecessary to set out, as they are sufficiently stated by the learned Judge who delivered the opinion of the Court.

The case was argued by *Evans* for the plaintiffs, and *Abraham* for the defendant, and the arguments urged were substantially the same as in the last case.

Cur. adv. vult.

BAYLEY, J. now delivered the judgment of the COURT :

This was also an action of trover for hops, which were the subject of sale from the defendant to Saxby, and the only distinctions between this case, and that of *Bloxam v. Sanders* are these, that the bought notes here imported that the hops were sold at certain credits,† that the defendant received 700*l.* in part payment of the price, that some of the hops were in the defendant's possession, and some in the warehouses of other

† The first contract was made on 30th August, and the other half on the 19th August, and the hops were the 6th September.
to be paid, one half by cash on the

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persons, in the defendant's name, and that the defendant sold them, some on the day the act of bankruptcy was *committed, and the rest after the commission issued, without returning to Saxby, or to the plaintiffs the 700*l.* or any part thereof. There was no notice to the persons who had any of the goods in their warehouses to transfer them into Saxby's name, but they remained after Saxby contracted to buy them as they did before. It was stated in this case also that it was verbally stipulated at the time of the sale that the hops should not be delivered till the price was paid, but as the admissibility of the evidence to this point was contested, and as our opinion is in favour of the defendant if this evidence be inadmissible, it is not necessary that we should give any opinion upon this point. The action in this case was not a special action for damages for selling without returning the 700*l.*, or for selling when according to his contracts with Saxby he had no right to sell, but it was an action of trover, assuming that the right of property was in the assignees of Saxby, and that the sale by the defendant vested also the right of possession in them, that this action, therefore, was maintainable, and that the assignees were entitled to recover, not merely their 700*l.*, and any damage they had sustained by the defendant's selling, but the full value of the hops. It seems to us, however, that upon the same principles which prevented the plaintiffs from maintaining the action against Sanders & Co., they cannot maintain the present action. The hops originally in the defendant's own possession, as they were suffered to remain there till defendant sold them, are exactly in the same situation as those hops for which Saxby bargained in the case of Sanders & Co., and as no notice was given to change the property as to those which were in the warehouse of third persons, *they stand substantially upon the same footing. We are, therefore, of opinion that in this case the defendant is entitled to the *postea*.

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Judgment for the defendant.

TILSON *v.* THE TOWN OF WARWICK GAS
LIGHT COMPANY.†

1825.

[962]

(4 Barn. & Cress. 962—969; S. C. 7 Dowl. & Ry. 376; 4 L. J. K. B. 53.)

An Act of Parliament for incorporating a gas light company enacted, that all the costs of obtaining the Act should be paid and discharged out of the monies subscribed in preference to all other payments: Held, that the attorneys who obtained the Act might maintain an action of debt founded upon the statute for their costs.

DECLARATION in debt stated that the plaintiffs, before the passing of the Act of Parliament thereafter mentioned, to wit, on, &c., at, &c., were retained and employed by and on the behalf of certain persons projectors of a certain undertaking for lighting the streets, &c., in the town of Warwick, in the county of Warwick with gas, to solicit and obtain an Act of Parliament for the completion and carrying on of the said undertaking, that they did solicit and obtain such an Act, intituled, an Act for incorporating the Warwick Gas Light Company, and that the necessary and proper costs, charges, and expences of the plaintiffs attending the applying for, obtaining, and passing the said Act amounted to the sum of 600*l.*, to wit, at, &c., whereof *the said Company had due notice. And that in and by the said Act it was enacted, that all the costs, charges, and expences attending the applying for, obtaining, and passing that Act, should be paid and discharged out of the monies to be subscribed by virtue of that Act, in preference to all other payments whatsoever. Averment, that divers large sums of money, amounting, in the whole, to 10,000*l.*, became and were subscribed by virtue of the Act, and came into the hands of the said Company, and there-

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† See this case commented on by the Judges of the Common Pleas in *Wyatt v. Metr. Board of Works* (1862) 11 C. B. (N. S.) 744; 31 L. J. C. P. 217; and by the Judges of the Court of Appeal in *Re Skegness and St. Leonards Co., Ex parte Hanly* (1888) 41 Ch. Div. 215; 58 L. J. Ch. 737. The authority of the case in the text seems reduced to the point, that an obligation expressed to be laid upon a party by Act of

Parliament to pay money to another is enforceable by action. Upon the question who are the parties intended by the Act to be the creditors in the obligation, the case is not to be relied upon as a decision. For the solution of this question we must look to the principles laid down by the late Lord Justice BOWEN in the latter of the cases referred to in this note.—R. C.

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upon it became the duty of the Company to pay, and they became liable to pay, and ought to have paid to the plaintiffs the said costs, charges, and expences of the plaintiffs attending the applying for, obtaining, and passing of the Act, from and out of the money so subscribed by virtue of the Act, in preference to all other payments whatsoever, and being so liable, the said Company then and there agreed to pay the same to the plaintiffs, when they, the Company, should be thereunto afterwards requested, whereby and by reason of the premises, and by virtue of the said Act, and of the said sum of 600*l.* being and remaining wholly unpaid and unsatisfied, an action accrued to the plaintiffs to demand and have of and from the said company the said sum of 600*l.*, parcel of the said sum above demanded. Other counts stated that the Company were indebted to the plaintiffs for work and labour in soliciting, procuring, and obtaining the Act; for money paid, laid out, and expended; and upon an account stated. General demurrer and joinder.

Russell in support of the demurrer. * * *

[966] *Walsh, contra.* * * *

[967] BAYLEY, J. :

It is not necessary to decide in this case whether a corporation may or may not be liable on a simple contract. That question is not raised by this demurrer as far as it applies to the first count of the declaration. That count states that the plaintiffs were employed to obtain the Act of Parliament; that they did obtain it; that their costs amounted to a certain sum, of which the defendants had notice; and that by the Act it was enacted that the costs attending the obtaining the Act should be paid out of the first money subscribed by virtue of the Act, in preference to all other payments whatsoever. It then states that money was subscribed by virtue of the Act; that it came into the hands of the Company, and that it became their duty to pay the costs to the plaintiffs, and that they did not pay. Now where an Act of Parliament casts upon a party an obligation to pay a specific sum of money to particular persons, the law then enables those

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persons to maintain an action of debt. It is said that the action should have been case, and not debt; and that on the 8 Anne, c. 14, case is the proper form of action against the sheriff for removing goods without levying a year's rent. The statute directs that the party at whose suit the execution is sued out shall, before the removal of the goods from the premises, pay the rent to the landlord; and the sheriff is empowered to levy and pay to the plaintiff the money so due for the rent, as well as the execution money. The object of the enactment was that no goods should be removed off the premises until the rent was secured to the landlord. The duty cast upon the sheriff by that Act of *Parliament is not to pay the rent to the landlord, but to levy the rent before the removal of the goods; and if he remove the goods without levying the rent, he is guilty of a breach of duty, and answerable for any damage ensuing from that breach of duty. If the statute had enacted that the rent should be paid to the landlord by the sheriff, then he might perhaps be answerable in an action of debt. Here the Act of Parliament does direct that the Company should pay the costs of obtaining the Act out of the first money subscribed, and those costs are due to the plaintiffs; and, therefore, I think the first count is maintainable. I am also disposed to think that the common counts may be supported. I am not convinced by the case of *Atty v. Parish*† that where a contract appears upon the face of a declaration to be such that the plaintiff may recover whether the contract be by deed or not, that it is necessary to declare upon the deed if there be one. The strong impression upon my mind is that upon principle, although there be a deed between the parties, yet if there be a debt independent of the deed, the amount of which, however, is to be ascertained by the deed, the existence of the deed will not prevent the party from recovering that debt upon the common counts. It is unnecessary, however, to determine that point, because I think that if a deed were necessary, we are justified upon general demurrer in presuming that there was such a deed, and that the neglect to set out the deed is mere matter of form. I am therefore clearly of opinion that the plaintiffs are entitled to recover upon the first count

† 1 Bos. & P. (N. R.) 104.

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and I also think that they are entitled to recover upon the common counts, because if the plaintiffs could not recover upon a contract, not by deed, we are bound to conclude *upon general demurrer that there was such a deed. The consequence is, that there must be judgment for the plaintiffs.

HOLROYD, J. :

I think that all the counts may be supported. The first count states all the facts necessary to constitute a debt. It does indeed contain an allegation that the defendants agreed to pay the money, but, independently of that allegation, the other facts stated in that count are sufficient to shew that the defendants were under a legal obligation to pay the money to the plaintiffs. That allegation, therefore, may be rejected as surplusage. In actions against the sheriff under the stat. 8 Anne, c. 14, for removing goods without levying a year's rent, the sheriff after notice from the landlord that a year's rent is due, becomes a tortfeasor by removing the goods, and liable in damages to the landlord for the consequence of that wrongful act. But here the Act of Parliament directed that the costs of obtaining the bill should be paid out of the first monies subscribed under the Act. When the money so subscribed came to the possession of the Company, they became by law liable to pay those costs; and the amount of them was money which the defendants owed to, and unjustly detained from the plaintiffs. So under the stat. 28 Eliz. c. 4, which says that the sheriff shall take for his fees no more than 12 pence for every 20*l.* under 100*l.*, and 6*d.* for every 20*l.* above 100*l.*, the sheriff may maintain debt for his fees, Com. Dig., Debt, (A 1). As to the common counts I am also of opinion that if a corporation cannot contract but by deed, we may upon general demurrer infer that there was a deed.

Judgment for the plaintiff.

K. B. EASTER TERM.

COHEN *v.* MORGAN.†

(6 Dowl. & Ry. 8—9.)

1825.
April 20.

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Where a person having lost a bill of exchange, which he supposes to have been stolen, goes before a magistrate, and relates the circumstance of the loss, and the magistrate grants his warrant to apprehend A. B. on a charge of having “feloniously stolen, taken and carried away” the bill of exchange, (language which the complainant did not use when he laid his information), and upon subsequent investigation of the case it turned out to be no felony: Held, that no ground existed for inferring malice on the part of the complainant, and no cause of action against him.

CASE against the defendant for falsely, maliciously, and without any probable cause, procuring the warrant of a justice of the peace, to apprehend the person of the plaintiff on a charge of feloniously stealing, taking and carrying away a certain bill of exchange, and thereby causing him to be imprisoned. Plea, not guilty. At the trial before Abbott, Ch. J. at the London adjourned sittings after last Term, it appeared from the evidence of the justice’s clerk, that, on a day mentioned, the defendant appeared at the justice-room in Whitechapel, and stated his complaint to the sitting justice of having lost a bill of exchange to the amount of 15*l*. The witness took the information of the defendant down in writing, in which the charge stated against the plaintiff was that he had “feloniously stolen, taken and carried away” the bill of exchange. The words “feloniously stolen, taken and carried away,” were not used by the defendant. This was the witness’s own language. Upon this information the justice granted his warrant, to apprehend the plaintiff on a charge of felony, which charge was couched in the language above-mentioned. The parties afterwards appeared before the justice, and upon an investigation of the merits of the case, the complaint was dismissed, the justice being of opinion that there was no ground for charging the plaintiff with a felony. Under these circumstances the LORD CHIEF JUSTICE held that there was no evidence to go to the jury that the defendant was actuated by malicious motives, and therefore directed a nonsuit.

† Relied on by the Court in *Carratt v. Morley* (1841) 1 Q. B. 18, 28.

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Gurney now moved for a rule *nisi* to set aside the nonsuit, and submitted that although it was not made out that the defendant was actuated by malice in the first instance in going before the magistrate, still the fact of his persevering in the charge when the plaintiff was brought before the justice, *and then giving a more detailed account of the transaction, was sufficient to go to the jury as evidence of a malicious motive.

ABBOTT, Ch. J. :

It appeared to me at the trial that the defendant had taken that which was the proper course. He had lost a bill of exchange, and had reason to suppose that the plaintiff had improperly possessed himself of it. Under this supposition he went before the justice, and related the facts and circumstances of the loss. It was for the justice to say whether those facts amounted to a felony, and to determine whether he would or would not issue his warrant to apprehend the party accused. After the defendant had related the facts of the case, the justice's clerk, instead of writing down what the man really said, wrote down what he took to be the fact, as mere matter of assumption. The defendant never used the words "feloniously stolen, taken and carried away," according to the language of the information. There was nothing in the defendant's conduct to shew that he was influenced by malice. To support the averment of malice, it must be shewn that the charge is wilfully false. But here, according to the evidence, the defendant merely related his story to the magistrate, leaving it to him to determine whether the facts amounted to a felony. I noticed at the trial the practice of drawing up informations in the manner in which the information in this case was drawn up. I thought it highly improper, and think so still. It is the duty of the justice's clerk to write down in the information what a witness says, as nearly as possible in the language used by the party, and not to frame the deposition in language in which no person, in common parlance, can be supposed to express himself. I think there is no ground for disturbing the nonsuit.

The other Judges concurred.

Rule refused.

LAMBERT v. KNOTT.

(6 Dowl. & Ry. 122—125.)

1825.

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By a local Act for the government of the poor of the parish of G. the churchwardens and overseers, and nine guardians and directors, or any five or more of them, were empowered to contract for the supply of the poor with provisions, and the parochial funds were directed to be paid into the hands of a treasurer, who was to apply the money under the orders of the governors and directors. Where the plaintiff contracted with the governors and directors for supplying the poor-house with goods, and acted under the orders of the churchwardens and overseers: Held, that the latter were personally liable, and that the plaintiff was not bound to join the governors and directors in the action.

ASSUMPSIT for goods supplied to the poor in the workhouse of St. Nicholas, Deptford, under a contract entered into by the plaintiff with the governors and directors of the poor of the parish. Plea, the general issue. At the trial before Alexander, C. B. at the last assizes for the county of Kent, it appeared that the defendants were the four overseers of the parish of St. Nicholas. By a local Act of Parliament, 27 Geo. II., the affairs of that and the adjoining parish of St. Paul are placed under the management of nine persons, by the title of "governors and directors," who are annually chosen at a public meeting of the churchwardens and parishioners. Power is thereby given to the churchwardens and overseers, together with the governors and directors, or any five or more of them, to contract for the supply of provisions, &c., for the maintenance of the poor. The money collected by the poor's rates is by the same statute directed to be paid into the hands of a treasurer appointed *under the provisions of the Act, who disburses the same under the orders of the governors and directors or any five or more of them. The contract in question was entered into by the plaintiff at a meeting of the governors and directors at which all the defendants were not present, but it appeared in evidence that after the contract was signed they all concurred in giving the plaintiff orders from time to time for delivering the supplies at the workhouse which were the subject of the present action. Contracts with tradesmen are entered in a book at the vestry meeting, and signed by the party contracting, and in the minutes of the proceedings the names of the parish-officers present are set down. It was objected that the contract having

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been made with the "governors and guardians," the defendants, as overseers and churchwardens, were not liable, especially as they had no funds in hand applicable to parochial purposes. The LORD CHIEF BARON refused to nonsuit, but saved the point, and the plaintiff had a verdict, with liberty to the defendants to move to enter a nonsuit.

Marryat now moved accordingly, and renewed the objection taken at the trial.

ABBOTT, Ch. J. :

The single point is, whether these defendants are in effect parties to the contract. If they are, the plaintiff has a right to sue them. He has nothing to do with the means by which they become parties to it. By the Act of Parliament the churchwardens and overseers, and any five or more of the governors and guardians of the poor, are empowered, at a public meeting to be held for that purpose, to contract with persons who think fit to make tenders for supplying the workhouse with necessaries. This plaintiff, it appears, attends at a meeting held in the vestry. He there finds persons professing to have authority to contract with him for supplying the workhouse. His tender is accepted and the contract is entered into. By the terms of the contract he is bound to supply such articles as the overseers may from time to time think fit to order him to *deliver at the workhouse during the continuance of his contract. Each of these defendants, who are the overseers, does from time to time give orders, and in consequence of those orders the goods are supplied. I own it does appear to me that looking at the clause in the Act of Parliament, by virtue of which this contract is entered into, this is a contract by each and every one of the overseers, who appear to have acted as governors and guardians. I admit it would be too much to say that a person who never attended a meeting of the guardians would be personally liable, but these defendants were in the habit of attending the meetings and had the management of the poor by giving orders to the plaintiff. This contract, therefore, is in my opinion personally binding on each and every of the defendants, and it is no objection to the plaintiff's right of

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recovery that he has not sued the whole of the governors and guardians.

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KNOTT.

BAYLEY, J. :

Whether all the governors and guardians may be liable over to the defendants is a different question, but it is perfectly clear that each of these four defendants is liable. The Act of Parliament does not authorize the governors and guardians of themselves to enter into contracts, but it says that the churchwardens and overseers with the governors and guardians, or any five or more of them, may enter into contracts. Here is a contract entered into by the plaintiff, nominally and upon the face of it with the "governors and guardians," but it is in substance with the governors and guardians and the churchwardens and overseers, who are capable of contracting. I therefore think that these defendants are liable upon the principle that they have acted upon and adopted this contract. It might be a different thing if no one of them had ever acted, but each of these defendants has, from time to time, given directions and has taken care that the contract entered into by the plaintiff should be fulfilled. The case of *Horsley v. Bell*† is similar in principle to the present. There certain commissioners for carrying on a canal navigation employed the *plaintiff to do work from time to time. There was a general fund which the commissioners had the power of collecting, and when collected it was to be paid into the hands of the treasurer. Orders were from time to time given by several of the commissioners, but they had issued more orders than the funds would cover, and the plaintiff sued them to make them liable *de bonis propriis*, and the Court decided that the plaintiff was not bound to look to the fund, but that he had a right to look to those persons by whom he was employed, and they held that every person concerned in signing an order was, in consequence of his signature, personally liable not merely for what the orders specified, but for the general business which the plaintiff had been performing under the contract. It seems to me that that case is very like the present, and acting upon the principle of it I am of opinion that these defendants, who came

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† 16 R. R. 89, n. († Dow, 354, n. ; 1 Br. C. C. 101, n.).

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in under this contract, acted upon and adopted it, are liable to the consequences.

LITTLEDALE, J. :†

I am of the same opinion. The plaintiff contracts nominally with the guardians and directors. It might be impossible for him to find out the names of all the persons who were the guardians and directors. He very properly resorts to those persons by whom the orders were given. The defendants must be considered as representing the whole body of persons contracting, they act upon the contract, and though they may not all have signed it, yet they are nevertheless liable by having adopted it.

Rule refused.

1825.
May 5.

THE KING v. JOHN NORTH.†

(6 Dowl. & Ry. 143—147.)

[143]

Information on 48 Geo. III. c. 143,§ for selling “beer or ale” without an excise license, is bad, and a conviction thereon, shewing that the defendant had sold ale only, quashed.

CONVICTION on 48 Geo. III. c. 143,§ for selling ale without an excise license, which being returned by *certiorari* was to the following effect:—

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County of Leicester. Be it remembered that on the 19th day of June, in the year of our Lord 1824, at Loughborough, in the county of Leicester, T. B. of &c. officer of excise, personally came before the Rev. R. H., Doctor in Divinity, one of his Majesty’s justices of the peace for the said county of Leicester, residing near to the place where *the offence hereinafter mentioned was committed, and as well for our lord the now king as for himself, informed him the said R. H. that John North of Wimeswould, in the said county of Leicester, did within three months now last past, to wit, on &c. at &c. sell beer or ale by retail to be drunk or consumed in his house or premises, without

† Holroyd, J. was absent.

638; 59 L. J. M. C. 133, 135.—R. C.

† Cited and followed by Lord COLERIDGE, Ch. J. in *Cotterill v. Lemprière* (1890) 24 Q. B. D. 634,

§ Repealed S. L. R. Act, 1872 (No. 2).

first taking out an excise license authorizing him so to do, contrary to the form of the statute &c., whereby and by force of the statute in that case made and provided the said John North hath forfeited and lost the sum of 50*l.*; whereupon the said John North, after being duly summoned to answer the said charge, appeared on &c. at &c. before us the Reverend T. P. Doctor in Divinity, and the Reverend J. D. clerk, two other of his Majesty's justices of the peace for the said county of Leicester, also residing near the place where the offence in the said information mentioned was committed, and the said John North, having heard the charge contained in the same information, declared he was not guilty of the said offence, whereupon we the said last mentioned justices did proceed to examine into the truth of the charge contained in the said information, and on &c. at &c. one credible witness, to wit, J. H. of &c. upon his oath deposeth and saith, in the presence of the said John North, as follows :

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That on the 24th day of May last he went to the house of the defendant at Wimeswould in this county, a retail brewer; that the defendant was not at home when he the witness first went, but the defendant soon came home, and he the witness drank two pints of ale with him the defendant in his house, for which he the witness paid the defendant sixpence. And the said John North, being now here called upon by us the said last mentioned justices for his defence, in the premises, produces before us the said last mentioned justices, S. M. of &c. as a witness on his behalf, who upon her oath deposeth and saith, as well in the presence of the said John North, as the said T. B. as follows: That Mrs. North came to witness's house, and in consequence of what Mrs. North said, the witness went to the *defendant's house to observe what passed, and found a stranger there; that the witness followed the defendant and the man (meaning the said J. H.) into every place when the defendant was shewing him his premises and is sure he did not pay for the ale. And the said S. M. being cross-examined by the said T. B., says that her husband is a tenant of the defendant, and witness's house is in the same yard with the defendant's; that the doors of the houses of the defendant and her husband are not more than six

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NORTH.

or seven yards apart, and the defendant's customers call for ale and drink it in her house. And the said J. H. being further examined by us the said last mentioned justices, positively denies the truth of Mrs. M.'s testimony, and says, that the said Mrs. M. was not at the defendant's house at the time he had the said ale, and that he never saw her that day. Therefore it manifestly appearing to us the said last mentioned justices, that he the said John North is guilty of the offence charged upon him in the said information, we the said last mentioned justices do hereby convict him of the offence aforesaid, and do declare and adjudge that he the said John North hath forfeited the sum of fifty pounds of lawful money of Great Britain, for the offence aforesaid. And we the said last-mentioned justices, by virtue of the statutes in that case made and provided, do mitigate and lessen the said sum of 50*l.* so forfeited by the said John North to the sum of 25*l.* of lawful money of Great Britain; the said sum of 25*l.* to be distributed and paid according to the form of the statute in that case made and provided. Given, &c.

F. Pollock now moved to quash this conviction, on the ground that the charge laid in the information being in the alternative, namely, that the defendant did sell "beer *or* ale," it was bad upon the face of it, and could not be helped by the evidence, for that applied to selling ale alone.

The COURT stopped him, and called upon

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S. M. Phillips, contra, who contended that this was an objection not now available, even supposing it to have any weight, for being merely an objection in point of form, it was concluded by the operation of the third section of the statute, which declares, that in all cases where it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, no advantage shall be taken of any defect of form. Here it appeared that the defendant had appeared and pleaded, and had gone into his defence upon the merits, and consequently no advantage could now be taken of the objection.

BAYLEY, J. :

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It does not appear to me that this is a mere formal objection ; I think it is a matter of substance. The information must contain a specific charge, without ambiguity, in order that the defendant may know what he has to answer.† Here the substantial charge, as stated in the information, is that the defendant committed either one offence or another ; *i.e.*, that he has sold beer *or* ale without a license. The evidence upon which the magistrates convict, applies to selling ale alone. Now I know of no case in which it has been held that if the charge in the information is informally made for being in the alternative, it can be made good by the evidence. There are many cases in which the Court has quashed a conviction, because the information has been uncertain, although the evidence has been sufficiently explicit. This defendant is called upon to answer an alternative charge, which cannot, I think, be made certain by the evidence. This is not, in my opinion, such a defect in form as is contemplated by the third section of the statute. Convictions upon an Act of Parliament so penal require a great deal of certainty ; and I think there is in this case the greater reason for yielding to this objection, that the statute prescribes a settled form of conviction, which has not been adopted.

HOLROYD, J. :

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There is no positive charge alleged against the defendant. It is alleged in the alternative, that he did one thing or another. This is matter of substance, and no intendment can be made to help the objection. In *Rex v. Jukes*,‡ which was a conviction on the statute 36 Geo. III. c. 60, which makes it an offence for any person to expose for sale metal buttons marked with the word “ gilt ” (the same not being really gilt), knowing the same not to be gilt, the conviction charged that the defendant did the act unlawfully and fraudulently contrary to the form of the statute ; but the Court held it bad, inasmuch as it did not expressly allege that the offence was committed knowingly ; and such defect, it was said, was not aided by a proviso in the statute,

† 2 Str. 900. See *Rex v. Middle-* 2 Hawk. P. C., c. 25, s. 59.
hurst, 1 Burr. 399 ; 1 Salk. 372 ; † 5 R. R. 445 (8 T. R. 536).

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v.
NORTH.

“that no conviction for any offence in the Act should be set aside for want of form or through the mistake of any circumstance, provided the material facts alleged were proved,” for this requires all material facts to be alleged, and knowledge is a material fact to constitute such an offence. That case is expressly in point.

LITLEDALE, J. :

This is an objection to the substance of the charge, and therefore I think the conviction is bad.

Conviction quashed.

K. B. TRINITY TERM.

1825.
June 8.
[341]

THE KING v. RABBITS AND OTHERS.†

(6 Dowl. & Ry. 341—344; S. C. 3 L. J. K. B. 230.)

An order and adjudication, founded on 11 Geo. II. c. 19, s. 4, for fraudulently and clandestinely removing goods and chattels, not exceeding the value of 50*l.*, to avoid a distress for rent, need not enumerate or specify the particular goods and chattels alleged to have been removed.

THE defendants, John Rabbitts the elder, John Rabbitts the younger, and William Parsons, had been convicted by two justices on the statute 11 Geo. II. c. 19, s. 4; the first named defendant of having fraudulently and clandestinely removed goods from his farm to prevent a distress for rent due to his landlord, and the other defendants of aiding and assisting him in the removal, and in default of paying double the value of the goods removed, were committed to the house of correction at Shepton Mallett, in the county of Somerset, for six months, there to be kept to hard labour, unless the sum awarded was sooner paid. The order and adjudication of the justices was to the effect following:

County of Somerset, to wit :

Whereas John Rabbitts the elder, of &c. hath been duly charged before us, two of his Majesty's justices of the peace

† Dist. *R. v. Davis* (1833) 5 B. & Ad. 551, 554.

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for the said county, (residing near the place where the goods and chattels hereafter mentioned were found, and not being interested in the lands or tenements from whence the same were so removed,) with having fraudulently and clandestinely removed and conveyed away his goods and chattels, not exceeding the value of fifty pounds, from a farm, lands and premises, called &c. in &c. now or late in the occupation of him the said John Rabbitts the elder, to prevent A. B., at the time of such removal and conveying away being the landlord of the said John Rabbitts, from distraining the said goods and chattels for arrears of rent then due to him, the said A. B., for the said farm, lands and premises. And whereas William Parsons, of &c. and John Rabbitts the younger, of &c. have been also duly charged before us with having wilfully and knowingly aided and assisted the said John Rabbitts the elder, in so fraudulently and clandestinely removing and conveying away the said goods and chattels, and in concealing the same. And we the said justices *having summoned the parties concerned, and examined the fact and all proper witnesses upon oath, and it appearing and being fully proved before us that the said John Rabbitts the elder did so fraudulently and clandestinely remove and convey away the said goods and chattels as aforesaid, not exceeding the value of fifty pounds, and being of the value of twenty-one pounds; and it also appearing and being fully proved before us that the said W. P. and J. R. the younger, and each of them, wilfully and knowingly aided and assisted the said J. R. the elder, in so removing and conveying away the said goods and chattels as aforesaid, and in concealing the same, we, the said justices, do therefore, this &c. determine and adjudge that the said J. R. the elder, W. P. and J. R. the younger, respectively are guilty of the offences with which they are charged as aforesaid, and that they are hereby convicted thereof. And we do hereby order and adjudge them to pay the sum of forty-two pounds, being double the value of the said goods and chattels, to the said A. B. or his bailiff, servant or agent, on or before the &c.

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Given under our hands &c.

Jeremy now moved for writs of habeas corpora to bring up the

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v.
RABBITS.

[*343]

bodies of the defendants from the house of correction at Shepton Mallett, for the purpose of being discharged, for an alleged defect appearing on the face of the justices' order and determination, above set forth. The objection to the order is, that though it professes to enumerate and describe the goods and chattels supposed to have been fraudulently and clandestinely removed, yet it does not do so in fact. The order recites that John Rabbits the elder had been duly charged before the justices with having fraudulently and clandestinely removed the goods and chattels "hereafter mentioned;" but there is afterwards no mention of any particular goods and chattels. Undoubtedly, as a mere order, which a proceeding on the 11 Geo. II. c. 19, s. 4, has, in *Rex v. Bissex*,† been held to be, it is not subject to the *same strict rules of construction as a conviction would be; but it is submitted, that the order ought specifically to enumerate and describe each article of goods supposed to be clandestinely taken away, and also to state the value of each. Now, the sole dispute between the parties in this case was, to whom the goods taken away really belonged. It was, therefore, of the last importance that the goods should be specifically enumerated and described, in order that the defendants might have the advantage of trying that question upon appeal. But, by this mode of stating the order and adjudication, they are concluded, and have no other mode than the present of taking advantage of the objection. In *Rex v. Bissex* there was a specific enumeration and description of the goods and chattels, in the following form: "that is to say, two cows, one heifer, and ten hundred weight of cheese." The same mode of specification ought to have been observed in this instance. He was proceeding to advert to the merits of the case, when

ABBOTT, Ch. J. said:

The merits are quite beside the present question. The statute does not require that the justices shall specifically enumerate, and set a value upon each article supposed to have been fraudulently and clandestinely removed, and therefore I think

† Sayer, 304. See 1 Salk. 369; and 1 Burn, 24th ed. by Chetwynd, Str. 996; id. 630; 2 Ld. Raym. 1406; 878, *et seq.*

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it is unnecessary for them so to do. Indeed, it would be most unreasonable to expect such an enumeration and valuation. It was competent for the defendants to have proved before the justices that the goods and chattels removed did not belong to Rabbitts the elder; and if they neglected so to do, it was their own fault. The question for us to decide is, whether the justices have shewn, upon the face of the order, sufficient matter for their jurisdiction, and have confined themselves within their jurisdiction. I think they have. All that they are required to do by the Act is to find the value, but not to specify the particular goods in the order. Here they have found the value, and we are bound to presume that the justices have done right in doing that which they have authority *to do. I see no objection to the order, and if the defendants have any other remedy, it is not by this mode of proceeding.

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BAYLEY, J. :

I am of the same opinion. The form of the order follows that given in Burn's Justice, which appears to me to be unobjectionable.

HOLROYD and LITLEDALE, JJ., concurred.

Writs refused.

1827.
Feb. 1.

[136]

SENIOR v. BUTT.

(5 L. J. K. B. 136.)

Undertaking by Attorney—Statute of Frauds.

The Court will not allow an attorney to set up the Statute of Frauds, to escape the consequence of a written undertaking, which he has given in a cause: And they will enforce such an undertaking upon motion; and not leave the party to his action.

MR. ALDERSON had obtained a rule, calling upon the defendant's attorney to shew cause why he should not pay the debt and costs. He had given an undertaking to procure the promissory notes of a third person to secure the debt and costs; and, on the faith of this undertaking, the plaintiff had stayed proceedings.

Mr. Holroyd now shewed cause:

First, he contended that the terms of the undertaking did not satisfy the Statute of Frauds; and, therefore, that the undertaking itself was void. (In support of this argument the learned counsel cited cases; but it is unnecessary to refer to them, as the judgment of the Court left him in possession of the argument, and conceded to him for the purposes of this motion, that the undertaking was really void, as he contended.) Secondly, he submitted, that even if the undertaking were not void by the Statute of Frauds, still the subject matter was matter of action only; and not of summary jurisdiction. And, thirdly, he went upon merits.

Mr. Alderson (contra) was stopped; and

The Court said that, even supposing the undertaking was void by the Statute of Frauds, that circumstance was anything but a reason against their exercising their summary jurisdiction over the attorney as one of the officers of the Court. As he had in his character of attorney given this undertaking, they would enforce it, and make him do that which, in his character of attorney in the cause, he had promised to do. They could not allow him to offer as an argument, that he had deceived people by giving them an undertaking which he knew at the time to be

void, and of which circumstance he intended, at the time, to avail himself if necessary. Indeed, if he really had done so with such an intention at the time, they might feel it their duty to notice his conduct in a much more serious form. They were also of opinion that the attorney had not satisfactorily answered the merits; and therefore

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Rule absolute; unless the attorney obtained the promissory notes in question for the plaintiff by a given day.

HARDING v. HARRISON.

(5 L. J. K. B. 249—253.)

1827.
June 7.
[249]

Action on the Case—Awards.

Pulling down an old party wall, and building one longer and higher, the substituted wall encroaching but the breadth of half a brick, is yet, in point of law, an injury of such a permanent nature as to give a right of action to the reversioner.

Although an award which finds the special facts is in the nature of a special verdict, it is not to be construed with so much strictness; but the award is to be maintained, if it is good in substance.

Accordingly,—A plaintiff declared in an action on the case for an injury done to his reversionary interest. The action was referred to an arbitrator, who found for the plaintiff, with nominal damages; but the language he used in finding the special facts appeared to indicate rather a possessory interest: Held, that the award was good, as the Court would not presume that damages had been given in respect of any injury but that which was the subject of the declaration.

Also,—an arbitrator gave a shilling damages, which he declared to be in full for the injury which the plaintiff had sustained up to the time of making the award: Held, that although the arbitrator had exceeded his authority in giving damages beyond the commencement of the action; yet, as the damages themselves were (and *a fortiori* the excess was) merely nominal, and could not affect the costs, the award was good.

THIS was an action of debt upon bond, conditioned to perform an award touching a former action between the same parties. The declaration set out the bond and condition, and the award, and averred the non-performance. The defendant, by his plea, set out the pleadings at length in the former action; then the award, and (contending as he did, that the award was void,)

HARDING prayed judgment. The plaintiff demurred; and the defendant
v. joined in demurrer: so that the question in substance was,
HARRISON. whether the plaintiff, upon the facts stated by the arbitrator, would be entitled to judgment in the original action. It was, therefore, to the original action that the argument was addressed.

[*250] It was a special action on the case. The declaration stated, that before, &c., a certain messuage or dwelling house, and a certain close, (which said close was, during all the time aforesaid, used as and was a yard belonging *to the said messuage or dwelling house,) with the appurtenances, were in the occupation of one Hugh Currie, as tenant to the plaintiff, the reversion thereof belonging to the plaintiff; that the defendant wrongfully, &c., pulled down and destroyed a certain wall, before that time erected, and then standing on the said close, and erected and built a certain wall of a certain building or warehouse in, upon, and over the close, in the possession of Currie the tenant, the said wall being of great length and height, to wit, &c., and placed divers, to wit, twenty windows in the last-mentioned wall, and thereby greatly deteriorated and lessened the value of the said close. By means of which premises the plaintiff was greatly injured in his reversionary interest in the said messuage and close. There were other counts, varying the form of the plaintiff's complaint, but upon those nothing turned. Before plea, the action was referred to a gentleman at the bar, (the costs to abide the event,) and he made his award, finding the special facts to the following effect:

"Having viewed the premises in the declaration mentioned, and considered all the evidence, I find that there was an ancient wall of the thickness of one brick, which divided a dwelling house of the said plaintiff, situate on the north side of King Street, in Liverpool aforesaid, and at the corner of Trafford's Lane, from a certain house of the said defendant, (which has been lately pulled down, and a warehouse built and erected by him in lieu thereof,) situate on the same side of King Street aforesaid, and which divided the yards of the said houses, one half of the thickness of which said wall I find to have stood on the close or yard of the plaintiff, and the other half on the close or yard of the defendant; and that the said wall was a party wall. And I do also find that

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the said party wall was, before the commencement of the action, pulled down by the defendant, and that the defendant did also before then build and erect a wall of considerable height, and of the thickness of one brick, and one half of a brick, extending over the scite of the said ancient wall, and that the said wall, so built by the defendant, forms the west side of a warehouse, which the defendant had also before then built as before mentioned. And I further find that the defendant had also before then placed three windows in the said last mentioned wall, to give light to the said warehouse, and which windows overlook the close or yard of the plaintiff. And I do award and declare that the property in the said wall so erected by the defendant is in the plaintiff to the thickness of half a brick (being one half of the thickness of the ancient party wall). And I do further award and adjudge, that the plaintiff is entitled to receive from the defendant the sum of one shilling, and which shall be received in full satisfaction of the injury sustained by the plaintiff at the time of making this my award."

[The question having been argued as to whether the award was good or bad,]

The Court were of opinion that the plaintiff was entitled to recover. First, they thought the injury complained of by the plaintiff and found by the arbitrator, was an injury of a permanent nature, affecting the reversion. It might be of present injury to the possession, and yet also an injury to the reversion. The reversioner was not to be left to his remedy, perhaps some years hence, against the tenant, merely because that tenant did not choose to abate the encroachment, or sue the wrong doer; nor was any inference to be drawn in favour of the wrong doer, because the tenant did neither one nor the other. Neither was the wrong doer entitled to go into a nice question as to whether the act complained of was beneficial or not: beneficial or injurious, he had no right to commit it. Secondly, they were of opinion that, although an award finding the special facts was in some measure analogous to a special verdict, yet the language of such an instrument was not to be construed with

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HARDING technical strictness ; and they concurred in the opinion of Lord
 ^{c.}
HARRISON. MANSFIELD† in that respect. Looking then at the award, substantially, and not with technical strictness, how was it possible not to see that the arbitrator had ascertained, and that it was well proved, that the plaintiff was the reversioner ? His giving plaintiff damages on a declaration in which he complained as a reversioner, shewed most clearly that he was satisfied of the plaintiff filling that character. On the third point, they, for the same reason, thought that the award could not be impeached. Generally speaking, the rule was as the defendant had contended ; but, when the main question had been raised merely to ascertain the rights of the parties, they would not sustain such an objection as that which, if it were good at all, must run thus : “ I admit that some damages should be given ; but I contend that a shilling is too much ; ” and which objection had no bearing upon the case, either as to costs, or to anything, except the difference between a shilling and some smaller sum not ascertainable.

Judgment for plaintiff.

† 1 Burr. 277.

C. P. EASTER TERM.

ROWLEY *v.* HORNE.

(3 Bing. 2—3; S. C. 10 Moore, 247; 3 L. J. C. P. 118).

1825.
April 21.

[2]

To fix a plaintiff with knowledge of a general notice by which a coach proprietor had limited his responsibility, it was proved that the plaintiff had taken in for three years a newspaper in which the notice had been advertised once a week; the jury having nevertheless found a verdict against the proprietor, the Court refused a new trial.

ACTION against a carrier for losing a parcel of bank notes which the plaintiff had forwarded by his coach. At the trial before Garrow, B., last Stafford Assizes, the defence set up was, that the defendant had, by a general notice, given out that he would not be responsible for parcels of any value unless certified at the time of booking, and paid for accordingly; and that no intimation had been given of the value of the plaintiff's parcel. To bring the knowledge of this notice home to the plaintiff, it was proved on the part of the defendant that the plaintiff had taken in for three years a weekly newspaper in *which the defendant's notice had always been advertised. The jury, however, found a verdict for the plaintiff to the amount of the loss he had sustained.

[*3]

Vaughan, Serjt. now moved for a new trial.

But the Court thought the verdict perfectly right, and that it could not be intended that a party read all the contents of any newspaper he might chance to take in. They said that carriers, who wished by means of a notice to divest themselves of a common law responsibility, were bound to fix upon their employers a knowledge of such notice, and that they might easily do so by delivering to every person who brought a parcel for conveyance a printed paper containing the notice.

Rule refused.

1825.
April 22.

[3]

TENNY v. MOODY.

(3 Bing. 3—9; S. C. 10 Moore, 252; 3 L. J. C. P. 122.)

C. devised lands to a feme covert for her life, and then, to the intent that she or her husband should not be entitled to receive the rents of the tenant, appointed trustees to receive them, pay them over to the wife, and attend to repairs; with power to distrain, lease, &c. By a codicil C. revoked the devise in the will, the trustees named therein having died, and devised the land to other trustees, to the same intents, and in the same manner in all respects, as if the new trustees had originally been named trustees in the will:

Held, that the new trustees took the legal estate in the land.

[*4]

THIS was an ejectment, brought to recover possession of two-fourths of certain mills, upon a forfeiture of a term in them, by non-payment of rent, according *to the conditions of a lease under which they had been demised to the defendant by Miss Callant, entitled to two-fourths, and Henry and Charles Gibbs entitled to one-fourth.

At the trial before the Chief Baron, last Kent Assizes, it appeared that six quarters' rent were in arrear; that the lessors of the plaintiff had in their particular claimed seven, and that the title of the Gunnings to the two-fourths arose on the following passages in the will and codicil of Miss Callant, who had died subsequently to the execution of the lease to the defendant.

1809. December 15th. Ann Callant, of the city of Rochester, spinster, by will, of this date, gave and devised (*inter alia*) her moiety or half part of and in a paper-mill, with the appurtenances, at Hawley, in the parish of Sutton-at-Hone, in Kent, then in the occupation of James Robson, his assigns or under-tenants.

Unto her niece, Amelia Brooke Westcott, otherwise Amelia Brooke de Varreux, wife or reputed wife of John Baptiste Charles Count Toutre de Varreux, formerly of the kingdom of France, but then a French emigrant, residing in Upper Norton Street, in Middlesex, for life, (subject to the directions thereafter mentioned and declared concerning the same estates and premises, and the rents and repairs thereof, and other matters relating thereto,) and immediately after the decease of her said niece, to the uses therein mentioned:

And said testatrix declared, that, notwithstanding, she had given and limited said estates to her niece and her children, and to her nephew, upon the contingencies therein mentioned, yet, to the intent and purpose that she or he should not be entitled to receive of and from the several tenants the rents thereof, nor that any neglect of needful and proper repairs might happen, the testatrix did thereby nominate and appoint George Gunning and George Hicks, and the survivor of them, his *executors, or administrators, receivers of the rents of said estates, with full power to make distresses on non-payment thereof; and desired and directed that thereby and thereout they should keep the same and every part thereof in good and tenantable repairs and condition; and that after discharge of this, and of every other necessary outgoing, they should pay the clear or net rents and profits to her said niece during her life, for her own sole and separate use, independent of said Count de Varreux, or any future husband, and free from his control, and all his debts and undertakings whatsoever; and for which rents and profits her receipts should be a sufficient discharge to said receivers or trustees.

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[*5]

Power to trustees to grant leases for life.

Ann Callant afterwards made a codicil, bearing date 1821, February 7th, reciting the before-mentioned will,—that said George Gunning and George Hicks had both departed this life,—and that testatrix was desirous to appoint the three sons of her late friend George Gunning, namely George Gunning, Robert Gunning, and William Gunning, to be trustees and executors of her said last will and testament.

And testatrix did thereby revoke and make void all and singular the devises and bequests in her said will and testament contained, of all her real and personal estates and every part thereof, to said George Gunning and George Hicks, upon and for certain trusts, intents, and purposes, and with, under, and subject to the powers, provisions, and directions therein expressed and declared of and concerning the same; and in lieu thereof, testatrix gave, devised, and bequeathed all and singular the real and personal estates, goods, chattels, rights, and credits, and every part and parcel thereof, unto said George Gunning (the

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[*6]

son), Robert Gunning, and William Gunning, their heirs, executors, administrators, and assigns, according to the nature of the respective estates, *upon and for the several and respective trusts, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, conditions, and directions in said will and testament expressed and declared, of and concerning the same estates and premises respectively, in the same manner in all respects as if the said George Gunning (the son), Robert Gunning, and William Gunning, had all of them been originally named as trustees and executors of said last will and testament, instead of said George Gunning and George Hicks, deceased.

And said testatrix did thereby nominate, constitute, and appoint said George Gunning (the son), Robert Gunning, and William Gunning, to be the executors of her said last will and testament.

The will and codicil were proved in the Prerogative Court of Canterbury, 8rd December, 1821, by the three executors named in the codicil.

A verdict having been found for the lessor of the plaintiff,

* *Taddy*, Serjt. moved for a rule *nisi* to set aside this verdict, and enter a nonsuit, on the ground, first, that the variance between the sums claimed in the particular, and the sum proved to be actually due, was fatal. At common law, the demand preliminary to a forfeiture was required to be made with the utmost precision; and if there was any inaccuracy, either as to the amount or the mode of making the demand, it failed of its effect. The present mode of proceeding, having been substituted for that at common law, ought to be pursued with equal caution, and watched with equal jealousy. If the defendant had known the sum claimed to have been that which was really due, he might have paid it into Court, under 4 Geo. II. c. 28.

[7] Secondly, the trustees named in the will took no legal estate under it: the land is limited to Mrs. Varreux for life, and there is no devise to them, while they are invested with a power to distrain and lease, which would have been unnecessary if they had taken the legal estate. They have nothing to do but to pay

money over to their cestui que trust; and where the functions of trustees are such as to not require them to be invested with the legal estate, the Court will not confer it on them, unless there be an express devise: *Shapland v. Smith*,† *Doe dem. Leicester v. Biggs*.‡ Then the trustees named in the codicil are ordered to take in the same way as if they had been named in the will, which makes their interest the same as the trustees in the will would have taken.

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BEST, Ch. J. :

There is no ground for either of the objections which have been raised against this verdict. With respect to the first, it has been insisted, that at common law a precise demand was a necessary preliminary to a forfeiture; it does not follow, however, that even at common law the precision which would have been necessary in the demand must also have been carried into the particular; but now the demand at common law is dispensed with under the provisions of 4 Geo. II.; and if no demand is necessary the plaintiff's case cannot be affected by the mere amount claimed in the particular. Then it has been insisted, that three of the lessors of the plaintiff have no legal title by the will under which they claim. Whatever doubt, however, might exist as to the construction of the will, is cleared away by the codicil. In that, the testatrix clearly gives the estate to the lessors in question: "I give, devise, and bequeath all and singular my real and personal estates, goods, chattels, rights, and credits, unto George Gunning, *Robert Gunning, and William Gunning, their heirs, executors, administrators, and assigns." These words give them the legal estate. If so, is it in this instance transferred to the cestui que trust under the Statute of Uses? That might be so, if, as in *Doe dem. Leicester v. Biggs*, the trustees had nothing to do. Here they have duties to perform: they are to receive rents and to see to repairs; and though the powers which have been given in the will were unnecessary to persons having the legal estate, yet the very insertion of the powers shews that the trustees were intended to act.

[*8]

† 1 Br. C. C. 75: stated 1 R. R. 521, 522. ‡ 11 R. R. 533 (2 Taunt. 109).

TENNY PARK, J. :

MOODY.

The difficulty of making a demand correctly at common law, with a view to a forfeiture, was one of the reasons which occasioned the passing of the 4 Geo. II., and I do not know that such a degree of precision was ever required for a particular as is now contended for. Though, under the 4 Geo. II., the plaintiff must prove that at least half a year's rent is in arrear, it does not follow that he is confined to that sum in his particular.

BURROUGH, J. concurred.

GASELEE, J. :

I have no doubt in this case. I am not satisfied that the trustees do not take the legal estate, even under the will, for if it can be collected from the whole will that they were intended to do so, particular words of devise are not necessary ; but upon the codicil there can be no question. In *Doe dem. Leicester v. Biggs* the trustees had nothing to do, but were merely to permit and suffer the devisee to receive the rent ; and the distinction is this, that if there be any thing for the trustees to do, beyond merely paying money over, they take the legal estate : here they are called on to lay out money in repairs. In *Silvester dem. Law v. Wilson*,† *which followed *Shapland v. Smith*, the trustee was to apply the rents received, to the maintenance of the testator's sons, which ASHHURST, J. relied on as a circumstance to shew that the testator intended the trustees to have a control over the money ; and in *Shapland v. Smith*, where they were to see to repairs, they were holden to take the legal estate ; so that it is clear on this will, that the female was not intended to take an executed use. On the first point raised I entertain no doubt ; it is sufficient, if at the trial the lessor of the plaintiff shews half a year's rent to be due, and the defendant is not injured by any excess in the particular.

[*9]

Rule refused.

† 1 R. R. 519 (2 T. R. 444).

REEDER v. BLOOM.†

(3 Bing. 9—11; S. C. 10 Moore, 261; 3 L. J. C. P. 120.)

The circumstance that the plaintiff's cause has been conducted by one who is not an attorney does not deprive the plaintiff of his right to full costs against defendant.

WHEN the costs were taxed for the plaintiff, who had obtained judgment in this case, it was objected, on the part of the defendant, that the person acting as attorney for the plaintiff had not taken out his certificate for the years 1819, 1820, and 1821; had never been re-admitted, and, therefore, under 37 Geo. III. c. 90, was incapable of practising.

An application having been made to a Judge at Chambers, he ordered the defendant to pay the costs into Court, subject to a motion to refund them; this was done, and there were conflicting affidavits as to the fact, whether or not the party in question was an attorney.

Wilde, Serjt. now moved that such portion of the costs as would go to the plaintiff's attorney for his services as *attorney might be refunded. He urged, that the person who had acted for the plaintiff, not being an attorney, the plaintiff could not be called on to pay him for services in that capacity; and that the defendant ought not to pay as costs an expence which the plaintiff could never be called on to incur; that it was as much the right and interest of the defendant as of the plaintiff that the plaintiff's cause should be conducted by a regular attorney, since the Court had not, in case of misconduct, the summary jurisdiction over other persons which it possessed over attorneys; and that in the King's Bench costs were not allowed to a person who conducted a suit, not being an attorney. He referred, also, to the statutes * * by which attorneys who practise without due admission are rendered liable to punishment.

1825.
April 22.

[9]

[*10]

BEST, Ch. J.:

If we acceded to this motion, a plaintiff, in addition to his own

† See now the Attorneys and Solicitors Act, 1874, s. 12; *Fowler v. Monmouthshire Canal Co.* (1879) 4 Q. B. D. 334.

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cause, would also have, in every instance, to try another, to ascertain whether or not his agent were an attorney. But we think there is no ground for the motion. In cases like the present the Court has always guarded against touching the right of the suitor, and has visited the offence on the party offending. It is now proposed that the plaintiff should lose his costs because his attorney has no certificate; but in what a situation would this place the plaintiff, if, as is usual, he makes at the outset advances to his attorney. The statutes shew that the Legislature never intended to touch the suitor, because all the punishment they inflict is directed against the attorney, who, if he practises without a regular title, is disabled to sue for his costs. Our power is sufficient, without pursuing the course which has been pointed out, because if a person practises whose name is not on the rolls, he is guilty of a contempt which the Court may punish, and make him do justice to all parties.

[*11]

PARK, J. :

It would be most dangerous to suitors at large if we were to grant this motion. The meaning of the statutes is, that if a non-attorney sues for his extra costs, he shall not recover them against his client.

The rest of the COURT concurring, the rule was

Refused.

GLOVER v. MONCKTON.†

(3 Bing. 13—19; S. C. 10 Moore, 453; 3 L. J. C. P. 189.)

1825.
April 27.

[13]

Devise of lands and personalty, in trust out of the rents to apply 250*l.* a year to the maintenance of devisor's daughter till she should be twenty-one, or marry, and out of the residue as much as should be thought necessary for the maintenance of devisor's son till he should be twenty-one or his sister marry, and upon his attaining twenty-one or his sister's marrying, to raise 5,000*l.*, and pay the interest of it to the daughter after her attaining twenty-one or marrying; and subject thereto that the trustees should stand seised of the residue in trust for the son till he attained twenty-one, and then to the use of the son, his heirs, executors, and administrators for ever. But in case the son should die under twenty-one and the daughter survive, or in case the son should live to twenty-one and afterwards die without lawful issue,—to the use of the trustees till the daughter attained twenty-one or married, and then to the use of the daughter for life, with divers remainders over:

Held, that the trustees took the legal estate till the 5,000*l.* was raised, and that but for the intervention of the trustees the son would have taken a fee with an executory devise over in the event of his dying without issue living at the time of his death.

THE MASTER OF THE ROLLS directed the following case for the opinion of this Court:

William Cheshire Glover by his last will and testament, duly executed and attested to pass real estates, devised all his real and personal estates to T. Birch and W. E. Hammond, and their heirs, executors, and administrators, upon trust, that they or the survivor of them, or the heirs, executors, or administrators of such survivor, should by and out of the rents, issues, profits, and produce of all or any part of the said real or personal estates, yearly and every year pay and apply the sum of 250*l.* towards the maintenance and education of the devisor's daughter, Ann Julia Glover, or so much thereof as would be necessary for that purpose, the residue thereof to accumulate for the use and benefit of his said daughter, and be paid or made payable to her, when she should arrive at the age of twenty-one years, or on the day of her marriage with the consent of the said trustees, whichever should first happen: and upon further trust, that they should pay and apply so

† Cited and applied by STIRLING, J. in *Clay v. Coles* (1887) 57 L. T. 682, 683—R. C.

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much of the residue of the rents, produce, and profits of the *said real and personal estates as they should in their discretion think necessary, for the maintenance and education of the devisor's son, William Cheshire Glover, (the above named plaintiff,) until he should attain the age of twenty-one years, or the day of marriage of devisor's said daughter, which should first happen; and when and as soon as his said son should have attained the age of twenty-one years, or his said daughter should be married with such consent as aforesaid, then upon this further trust, that they should with all convenient speed, by mortgage, sale, or other disposition of all or any part of the said real or personal estates, levy and raise, or borrow and take up at interest the sum of 5,000*l.*, and should stand possessed thereof when so raised as aforesaid, upon trust to pay the same and the interest thereon from the time when devisor's said daughter should arrive at the age of twenty-one years, or be married with such consent as aforesaid, unto the said daughter: but in case the said daughter should arrive at the age of twenty-one years, or be married in devisor's lifetime, then his will and meaning was, that the said sum of 5,000*l.* should be raised and paid in manner aforesaid, as soon as conveniently might be after his decease, with interest from the time of his decease: and subject to the payment of the said sum of 5,000*l.* so to be raised as aforesaid, and the interest thereof in manner aforesaid, then that the trustees should stand seised and possessed of the residue of the said real and personal estates after such sale or other disposition as aforesaid, in trust for the sole use and benefit of his said son until he should attain the age of twenty-one years, and when and so soon as he should arrive at the age of twenty-one years, then subject as aforesaid to the use of and in trust for his said son, his heirs, executors, administrators, and assigns for ever, according to the nature of the said estates

[*15] *respectively: but in case his said son should not live to attain such age of twenty-one years, and his said daughter should be living at the time of the decease of his said son, or in case his said son should live to attain such age, and should afterwards die without lawful issue, then as, to, for, and concerning all his said real estates, to the use of the said trustees and the survivors

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or survivor of them, and the heirs and assigns of such survivor, until his said daughter should attain the age of twenty-one years, or the day of her marriage with such consent as aforesaid, and then to the use of his daughter for life; remainder to trustees to support contingent remainders; remainder to the first and other sons of his daughter in tail male successively; remainder to the daughters of his daughter as tenants in common in tail, with cross remainders between them; remainders over in like manner to the deviser's brother and nephew successively for life, (with trustees to support contingent remainders,) and to their sons successively in tail general; remainder to deviser's own right heirs. Then followed various dispositions of personal estate in case deviser's son "should not live to attain the age of twenty-one, or living to attain such age, should afterwards die and should not leave lawful issue of his body:" provided always, that in case it should be necessary for raising the said sum of 5,000*l.* bequeathed to his said daughter, and for other the purposes contained in his will, either to make sale, or otherwise dispose of or mortgage all or any part of his said real and personal estates, then he thereby gave the trustees full power and authority so to do, and that their receipts should be a sufficient discharge to the purchaser; and he thereby empowered them at any time to lay out and invest any part or parts of his personal estate at interest, on real or other securities, in some of the public *funds, and from time to time to alter and transpose such securities or funds.

[*16]

At the time of the commencement of the suit, Ann Julia Glover had attained twenty-one, but the 5,000*l.* had not been paid or raised out of the real estate, and the testator's personal estate was not sufficient to discharge it.

The questions for the opinion of the Court were:

What estate does the said William Cheshire Glover, the devisee, take in the testator's real estate, under the limitations in his said will, he the said William Cheshire Glover, the devisee, having attained the age of twenty-one years?

And if the Court should be of opinion that the trustees, the said Thomas Birch and W. E. Hammond, take the legal estate in fee, under the limitations in the said will, then whether the

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said William Cheshire Glover, the devisee, would have taken any and what estate in the testator's said real estates, by virtue of his said will, in case the devise to him had been made without the introduction of trustees, he the said William Cheshire Glover having so attained his age of twenty-one years.

Peake, Serjt. for the plaintiff:

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W. C. Glover took under the devise an estate tail. The Court will not establish an executory devise in any case, where, as in the present, there is a sufficient freehold to support a contingent remainder; and the rule is now settled, that where lands of inheritance are devised to one and his heirs, and if he die without issue, then over, that is an estate tail, because the words "if he die without issue" manifest an intent in favour of the issue. In *Doe dem. Ellis v. Ellis*,† where the devise was to the devisor's son, his heirs and assigns, but in case his son should die *without issue, then over, it was holden the son took an estate tail. So in *Dansey v. Griffiths*‡ and *Tenny v. Agar*,§ in which cases the expression was, "if he die and leave no issue;" and Lord ELLENBOROUGH said the general rule was clear, that the words "in case he die without issue," must be construed to mean a general failure of issue. It is true, that in bequests of personalty, the same words have been construed to mean only a dying without issue living at the time of his death; and in *Porter v. Bradley*,|| Lord KENYON thought the same construction ought to be applied in real as in chattel interests; but in *Daintry v. Daintry*,¶ he admitted the distinction; and in *Crooke v. De Vandes*,†† Lord ELDON confirmed the old rule. In *Roe v. Jeffery*,‡‡ indeed, a devise similar to the present was adjudged to be a devise of the fee with an executory devise over, but in that case it was clearly collected from the whole of the will, that the failure of issue intended by the devisor, was a failure of issue at the death of the first taker. With respect to the trustees, they take a chattel interest, determinable on the

† 9 East, 382.

‡ 16 R. R. 383 (4 M. & S. 61).

§ 12 East, 253.

|| 1 R. R. 675 (3 T. R. 143).

¶ 3 R. R. 179, 182 (6 T. R. 307, 314).

†† 9 Ves. 197, 203.

‡‡ 7 T. R. 589.

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devisee's attaining twenty-one. The general rule is laid down in *Doe dem. White v. Simpson*,† confirmed by *Hawker v. Hawker*,‡ that trustees shall not take a fee where a lesser interest is sufficient to enable them to execute the purposes of the trust. Here, it was not necessary for them to take more than a term, in order to raise the 5,000*l.*, and they are also furnished with a power which would not have been necessary had they taken the fee.

Wilde, Serjt. *contra* :

The plaintiff took an equitable estate in fee, with an executory devise over in case of *his not leaving issue living at the time of his death, and the trustee took a legal fee. Admitting the general rule to prevail, as laid down in the cases which have been cited, it may be controlled by an express intention appearing on the face of the will to the contrary, and such an intention appears in the present will, which contains provisions not to be found in any of those which have been the subject of former decisions. The will was evidently framed by a skilful person; many estates tail are properly created; from which it may be inferred, that the limitation in fee was designedly created. If the daughter had died first and then the son, before twenty-one, he must have taken an estate in fee, or no meaning can be attached to the words of inheritance. In most of the cases where the words on which the remainder over was limited, have been holden to give an estate tail to the first taker, the estate to the first taker has not been accompanied, as here, with words of inheritance. But in *Roe v. Jeffery*, where the estate was given to the first taker and his heirs for ever, the first estate was holden to be a fee, and the remainder over good, by way of executory devise. So also in *Doe v. Webber*.§

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Peake, in reply, contended, that the devisor's intention, in the event of the daughter dying first, and then the son, before twenty-one, must be collected from the succeeding limitation and the whole context of the will, from which,

† 5 East, 162.

§ 19 R. R. 438 (1 B. & Ald. 713).

‡ 22 R. R. 471 (3 B. & Ald. 537).

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[*19]

including the provisions in respect of personal property, it was clear, that the estate was not intended to go over till a general failure of issue, and that would give the son an estate tail. In *Doe v. Webber* 1,000*l.* was ordered to be paid out of the estate to the executors of a person in being, by the person *in remainder, which shewed that the deviser did not mean an indefinite failure of issue, when she limited the remainder over on the first taker's leaving no child or children.

The following Certificate was afterwards sent :

“ We have heard this case argued by counsel, and having considered it, are of opinion that the legal estate in the real estates of the testator is in the trustees, Thomas Birch and William Henry Hammond, and will continue so until the 5,000*l.* shall have been raised as directed by the will. And that William Cheshire Glover, the devisee, would have taken an estate in fee in the said testator's real estates, by virtue of his said will, with an executory devise over, in the event of his dying without issue living at his death, in case the devise to him had been made without the intervention of trustees, he, the said William Cheshire Glover, the devisee, having so attained his age of twenty-one years.

“ W. D. BEST,
“ J. A. PARK,
“ J. BURROUGH,
“ S. GASELEE.”

MARY DOWSE *v.* COXE AND ANOTHER.†

(3 Bing. 20—31; S. C. 10 Moore, 272; 3 L. J. C. P. 127.)

1825.
April 30.

[20]

Declaration, that a cause being depending in Chancery between M. D. and divers infants plaintiffs, and T. B. since deceased, and J. R. defendants, it was ordered, with the consent of the attornies of the parties in the suit, that the matters in question in the suit and all disputes between M. D. and T. B. should be referred to the arbitrament of W. C., who was to make one or more awards, and in case either of the parties should die, the death was not to abate the reference; that T. B. afterwards died before the making of the award; that the arbitrator awarded that the executor of T. B. should pay plaintiff 225*l.* out of T. B.'s assets, and that being so liable, the defendant, executor as aforesaid, promised to pay:

Held, by the Common Pleas, on demurrer, that the action lay against the executor; that the promise sufficiently appeared to have been made in his representative capacity; that a sufficient authority to refer was shewn, and a sufficient award to enable plaintiff to sue; and that the authority was not revoked by the death of T. B.‡

But held by the King's Bench, on error, that the submission was void for want of mutuality,—it not appearing that the attornies in the suit had any sufficient authority to refer on behalf of the infants.

THE plaintiff declared, for that whereas, before the making of the promise and undertaking of the said defendants, as herein-after next mentioned, certain differences had arisen, and a certain suit was then depending in the High Court of Chancery in which the said plaintiff Mary Dowse, widow, and divers other persons, including infants, by their next friend, were plaintiffs, and Peter King, Thomas Biddell, since deceased, and John Reay, defendants; And whereas, by an order of the Right Honorable Sir JOHN LEACH, Knight, Vice-Chancellor of England, bearing date the 14th of June, 1823, it was amongst other things ordered, with the consent of the attornies of the parties in the said suit, that the several matters in question in the said suit, and all disputes and differences then subsisting between the said plaintiff Mary Dowse, John Lightfoot Wilkinson, and Mary his wife, William Jones and Elizabeth his wife, and James May and Susannah his wife (being certain of the plaintiffs) and Peter

† Cited by MELLISH, L.J. in *Farhall v. Farhall* (1871) L. R. 7 Ch. 123, 127.—R. C.

‡ As to the meaning of the expression in the Act of 1889, "a

submission shall be irrevocable" (52 & 53 Vict. c. 49, ss. 1, 27), see *In re Smith and Nelson* (1890) 25 Q. B. Div. 545; 59 L. J. Q. B. 533.—R. C.

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King and Thomas Biddell, since deceased, (being certain of the defendants) should be referred to the award, arbitrament, and final determination of William Cooke, of Lincoln's Inn, Esquire, who was to be at liberty to make one or more award or awards of and concerning the matters thereby referred to him, as he should think fit; so as such award or *awards should be made in writing under the hand and seal of the said William Cooke, ready to be delivered to the said parties, or to such of them as should require the same, on or before the 23rd day of June then next, or on or before such ulterior day or days as the said William Cooke should from time to time appoint, in writing, by endorsement upon the said order; and in case either of the said parties should happen to die before the making of the final award under the said reference, the said reference was not to abate, but the executors and administrators of the parties so dying were to be considered and taken as parties to the said order, in like manner as their testator or intestate; and the said plaintiff further said, that afterwards, and before the making of the award of the said William Cooke, thereafter mentioned, to wit, on, &c., the said Thomas Biddell died, to wit, at, &c.; and the said plaintiff further said, that the said William Cooke afterwards, and during the time for making his award, to wit, on, &c., at, &c., made his certain award in writing under the hand and seal of him the said William Cooke, between the parties aforesaid, of and concerning the said differences; and thereby then and there (amongst other things) awarded, that the said defendants, as executor and executrix of the said Thomas Biddell, deceased, should, out of the assets of the said Thomas Biddell, on the 27th day of July then next, pay to the said plaintiff the sum of 225*l.*, of which award of the said William Cooke, the said defendants, as executor and executrix as aforesaid, afterwards, to wit, on the said 7th day of July, in the year last aforesaid, had notice, to wit, at, &c.; by reason of which said premises the said defendants, as executor and executrix as aforesaid, became liable to pay to the said plaintiff the said sum of 225*l.*, according to the tenor of the said award, to wit, at, &c., and being so liable, they the said defendants, executor and executrix as aforesaid, *afterwards, to wit, on, &c., at, &c., in

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consideration thereof, undertook, and then and there faithfully promised the said plaintiff to pay to her the said sum of 225*l.* at the time and in manner as in the said award was directed ; and the said plaintiff in fact said, that though the said defendants, executor and executrix as aforesaid, were afterwards, to wit, on, &c., requested to pay the said sum of 225*l.* to the said plaintiff, according to the tenor of the said award, yet the said defendants, executor and executrix as aforesaid, not regarding their said promise and undertaking, so by them in manner and form aforesaid made, but intending to injure the said plaintiff in this behalf, did not nor would, when so requested as aforesaid, nor at any time before or since, pay the said sum of 225*l.*, or any part thereof, to the said plaintiff ; but wholly neglected and refused so to do, to wit, at, &c.

To this count there was a demurrer, and the causes of demurrer assigned were, that it is not stated, nor does it appear in the said count, that the said defendants, before the making of the said award, had any notice of the said supposed submission, or were parties thereto, or were summoned to appear before the said arbitrator, or had any notice of the said supposed submission ; and also, for that it is stated, in and by the said count, that the said defendants personally undertook to pay the said sum of money therein mentioned, whereas no liability or other consideration is stated to support such a promise ; and also, for that it is not alleged, nor does it appear, in or by the said count, that the said defendants had at any time any assets of the said Thomas Biddell, out of which they could have paid the said sum of money in the said count mentioned, or any part thereof ; and also, for that the said count is in other respects uncertain, informal, and insufficient.

Wilde, Serjt. in support of the demurrer :

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First, the promise alleged to have been made by these defendants is a personal promise, for which no consideration is stated. It is not stated that they promised *as* executor and executrix, or that they have assets, but that they, executor and executrix, promised ; this language implies a promise which has no connection with the affairs of the testator, and on which,

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therefore, the defendants are not responsible: *Henshall v. Roberts*,† *Brigden v. Parkes*.‡

Secondly, the order of reference is made by consent of attornies only ;—of all matters in difference ;—and between certain, (not all), of the parties. But *all matters* may comprehend matters out of the suit, which an attorney has not authority to refer ;—the infants, in this case, could not appoint an attorney ;—and supposing the interest of the infants to be omitted, then an award on part only of the matters referred, is insufficient.

Thirdly, the authority to refer was revoked by the death of Biddell. It is only by statute that the death of a party, even after verdict, fails to abate a suit, but in every other case, death operates as a revocation of any authority. An agreement by a testator cannot bind his executor to a reference, for if it could, it might operate indirectly to affect the distribution of assets : an award made after revocation is unavailing, (*Vynior's case*)§ even where the revocation is a contempt of Court: *Clapham v. Higham*. . Bac. Abr. Authority E ; and a letter of attorney to deliver seisin after the death of the feoffor is void.

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Fourthly, an action cannot be maintained on a non-observance of an order of Court: *Emerson v. Lashly*,¶ **Smith v. Whally*,†† *Carpenter v. Thornton*.‡‡ The remedy for such a wrong can only be by application to the Court which issued the order.

Taddy, Serjt. *contrà*, was relieved by the Court from arguing the first point.

On the second, he argued, that admitting the award had exceeded the authority, admitting the arbitrator had decided on matters not in difference, or had omitted any that ought to have been included, it was sufficient on this declaration, if the Court could see a *prima facie* authority, sufficient to constitute a consideration for a promise by the executors ; that here such an authority sufficiently appeared in the attornies for the parties, for it did not appear that they were merely attornies in the suit, and the Court would not minutely enquire into the nature of the

† 5 East, 150.

‡ 2 Bos. & P. 424.

§ 8 Co. Rep. 81 b.

|| 1 Bing. 87.

¶ 3 R. R. 370 (2 H. Bl. 248).

†† 2 Bos. & P. 482.

‡‡ 25 R. R. 299 (3 B. & Ald. 52).

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authority, but would enforce an agreement which acknowledged its existence: *Filmer v. Delber*;† that it was sufficient for a plaintiff to set out so much of an award as made for him: *Bac. Abr., Arbitr. G. Banfill v. Leigh*;‡ and that though the submission was by certain persons, and the award only mentioned some of them, it might be taken distributively, especially as the arbitrator was empowered to make more than one award: *Dyer, 216 b, 217 a*; 1 *Rol. Abr. 246, l. 20*. In *Bacon v. Dubarry*,§ which might appear conflicting, the award was bad for want of reciprocity. With regard to the infants, it appeared that the proceeding was in Chancery, and it must be presumed, that Court had not proceeded without due regard to the interest of the infants; besides, any defect of authority on their part would only render the award voidable, and not void, *and the infant

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might agree or disagree at his full age: *Com. Dig., Arbitr. D. 2*. As to the supposed revocation of the arbitrators' authority by the death of Biddell, though a testator could not bind his executor to submit to arbitration, he might bind him to pay any sum which the testator owed: *Powell v. Graham*,|| or which he should be found liable to pay under an arbitration already in progress: *Tyler v. Jones*:¶ and in orders at *Nisi Prius*, it has often been recommended by the Court to insert a provision that the death of either of the parties shall not suspend the proceedings of the arbitrator: *Cooper v. Johnson*.††

The answer to the fourth objection, is, that this action is not brought on an order of Court, but on an agreement made in consequence of the order.

Wilde, in reply:

By the expression "their attornies" must be meant attornies in the suit, (although, technically speaking, there are no attornies in Chancery,) because there are no such words in the declaration as "authorised in that behalf," under which the Court could extend the attornies' authority to other matters. Although it may not be necessary to shew the precise nature of the authority,

† 12 R. B. 688 (3 Taunt. 486).

‡ 8 T. B. 571.

§ 1 Salk. 70.

|| 18 R. B. 593 (7 Taunt. 580).

¶ 3 B. & C. 144.

†† 20 R. B. 483 (2 B. & Ald. 394).

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some authority must appear, and none is shewn here. In *Banfill v. Leigh* the party distinctly shewed he was entitled to claim under the award. But in *Cavendish v. ———*† the Court refused to bind an adult where an infant was concerned who might afterwards disagree. In *Mitchell v. Stareley*,‡ the award was holden bad, because all the matters referred were not decided on. Although the statement of the consideration for submitting, includes all the parties submitting, *the submission is void if there be not an authority from all: *Antram v. Chace*.§ In *Filmer v. Delber* there was a reference of the cause only. As to the revocation, it is true that a testator may bind his estate to pay a given sum, but a covenant not to revoke an authority is not a covenant to pay.

[*26]

BEST, Ch. J. :

The first objection which has been raised, is, that the promise in the declaration is a personal promise for which there is no consideration; I am of opinion that this is not so; that the promise is made by the defendants as executor and executrix, and is not merely personal; if so, the promise to pay is only a promise to pay out of funds which may come to them as executor and executrix. Looking, indeed, only at particular words, the case might fall within those decisions of the King's Bench which have laid it down that a promise by parties, executors, without saying *as* executors, is a personal engagement; but on looking to the whole declaration, there can be no doubt that the promise sufficiently appears to have been made by the defendants in their character of executors. The declaration states the order of the VICE-CHANCELLOR to refer to arbitration certain matters in dispute; it states the arbitrators' award, that the defendants should, out of the assets of Thomas Biddell, pay to the plaintiff 225*l.* on the 27th of July then next, of which award the defendants, as executor and executrix, had notice; by reason whereof they became liable *as* executor and executrix, according to the tenor of the award; and being so liable, (that is, according to the tenor of the award,) they, executor and executrix as aforesaid, promised

† 2 Ch. Cas. 279.

§ 15 East, 209.

‡ 14 R. R. 287 (16 East, 58).

to pay; that is, they promised to pay what the arbitrator ordered; which was, a payment out of the assets.

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The second objection is, that as to some of the parties the arbitrator was not properly constituted. If the arbitrator has no authority, that is a matter of substance to be urged on general demurrer; but if he has some, and the objection is, that it is not sufficiently comprehensive, that objection ought to be made on special demurrer. I am of opinion, however, that it does sufficiently appear on the face of this declaration, that the arbitrator was regularly appointed to make the award he *has* made. Whether or not his authority extended to enable him to settle other matters which he might have deemed it expedient to enter on, is another question. The declaration states, that by an order of the VICE-CHANCELLOR it was “ordered, with the consent of the attornies of the parties, that the several matters in question, and all disputes and differences then subsisting between the plaintiff Mary Dowse, J. L. Wilkinson, and Mary his wife, James May and Susannah his wife, and Peter King and Thomas Biddell deceased, should be referred to the award of William Cooke, Esquire, who was to be at liberty to make one or more award or awards of and concerning the matters referred to him.” It has been said that as infants were concerned in the disputes between these parties, it ought to have been referred to the Master, to ascertain what course was most for the infants’ benefit. Whatever was the proper course to be pursued, we may presume, till the contrary appears, that the Court of Chancery has followed it. It is stated, that the reference was ordered with the consent of the attornies of parties in the suit, whence I conclude it was with the consent of persons properly authorised; for, strictly speaking, there are no attornies in the Court of Chancery. It is true that an infant cannot appoint an attorney, but it does not follow that he may not submit to arbitration, or that his next friend *may not have an attorney to act for him. It is urged, however, that supposing these attornies to have been attornies for the parties, the extent of their authority is not sufficiently alleged; the declaration containing no such expression as “thereunto duly authorised;” but those words are not necessary in all cases;

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by the demurrer, it is admitted that these persons were attornies of the parties in the matter of the reference; and if they were attornies to refer, they had authority to choose an arbitrator. As to the argument that the infants cannot be bound,—what has been done is not void with respect to them, but only voidable; and the supposed hardship of the infant's having an election unfairly to rescind the award does not exist, because at the time of the submission, all the parties knew they were dealing with infants.

It is not necessary for us to decide whether or not attornies in a cause have authority to refer matters out of it, for it seems clear that these persons were attornies for the parties generally; and for aught that appears to the contrary, they may have been specially authorised for this purpose. If they were specially authorised, although their authority would be revoked by the death of their principal, yet acts done before his death, might affect his personal estate after.

Another objection which has been urged, is, that as all the parties referred differences in which they were mutually concerned, the arbitrator could not decide any question separately. But it does not appear that he has decided on any separate concerns, and he has authority to make one or more awards, in which he may include distributively the several matters referred. Even if this were a distinct claim, the arbitrator might make a distinct award, according to *Athelston v. Moon*,† in which the arbitrator was to award on all matters that either
[*29] *might have against the other. It has, however, been urged here, that the arbitrator cannot decide on all matters, because some of the parties are infants; and that if he cannot decide on all, his award is not final for any. But the old law is clear, that if the reference be general, without any express stipulation that the arbitrator shall decide on all the matters referred to him, the award may be good for part; and this law has not been altered; for the case of *Mitchell v. Staveley* contained an express stipulation that the arbitrator should decide on all the premises; Lord ELLENBOROUGH says, “It was a condition of the submission that they were to award upon all matters in difference

† Com. 547.

between the parties." No such words are contained in the present submission, and they were probably designedly omitted, because the arbitrator might have found it impossible to decide between all the parties at once, and he is expressly empowered to make more awards than one.

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The last objection is, that the authority to the arbitrator has been revoked. I have felt some difficulty about this, because it has been urged, that if such an authority be not revoked by death, a man might place his executor or his administrator (perhaps a creditor) in an awkward situation. But if he chooses to place them in such a situation, the convenience or inconvenience of his own act cannot be discussed here. In the present case he has said, in effect, "the arbitrator shall go on notwithstanding my death;" if any inconvenience ensue, he has brought it himself on his representative, who may elect whether or not he will except the office. It has been said, indeed, that this is no more than a covenant not to revoke the authority by any act of the party covenanting; that death will operate as a revocation independently of any such covenant; and that the covenant does not abridge the covenantor's power to revoke, but only gives an action against him, in case he violates his *covenant. But the engagement is, not that the party will not revoke, but that death shall not abate the arbitration. It has been asked, whether an agreement that a suit shall not abate by death, would enable a Court to proceed with the cause; it is not necessary to decide that; for though an agreement of the parties may not give a Court jurisdiction, that doctrine does not apply to a domestic forum erected by the parties themselves. We cannot doubt that justice has been done in the present case; the objections which have been raised are merely formal; and our judgment must be for the plaintiff.

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PARK, J. expressed his concurrence.

BURROUGH, J. :

We must presume that the order of reference given by the VICE-CHANCELLOR was regularly made by the Court, and the interests of the infants must have been in the hands of their

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guardians. There is nothing in the award contrary to the interest of those infants, and the arbitrator's authority was not revoked by the death of Biddell. The law touching revocation, does not apply to this case, which is not the case of a simple authority, but one in which the party expressly binds his effects to the result of the award, and the action is brought against the defendants, only in their representative capacity. Besides, the reference was in an equity suit, in which every person is joined who has the remotest interest in the matters in dispute, and the arbitrator has an equitable jurisdiction, which he does not possess in a reference at law: if this were an award at law, there might perhaps be objections to it, which cannot now be raised; our judgment must be *de bonis testatoris*.

GASELEE, J. concurred.

1827.

BIDDELL *v.* DOWSE.

[6 B. & C.
255]

(6 Barn. & Cress. 255—266; S. C. 9 Dowl. & Ry. 404.)

[THE above judgment having been brought, by error, into the King's Bench, the judgment of the Court of King's Bench, after argument and consideration, was pronounced as follows by]

[263] ABBOTT, Ch. J. :

The action against the plaintiff in error was brought in the Court below on an alleged promise to pay a sum of money awarded, the consideration for the promise being an assumed legal obligation to make such payment according to an award. Nothing appears to shew a legal obligation arising after the award to pay the money in pursuance of the award, unless there had existed previously, and before the award, a legal obligation to abide by and perform it when it should be made. Such a legal obligation subjecting a party to an action for non-performance, must arise out of some valid and competent submission to the authority of the arbitrator. It therefore becomes necessary to consider, whether, upon the facts set forth in the declaration, there appears to have been such a valid and competent

submission. The submission mentioned in the declaration is an order of the VICE-CHANCELLOR made in a suit pending before him by consent of the attornies of the parties in the suit. It is not alleged that the testator assented to the reference, or that he or his executors had any knowledge of it before the award *was made. The order of the VICE-CHANCELLOR cannot be enforced by action. This was admitted. Then was the consent of the attornies of the parties to the suit, without more, a valid and competent submission? In order to answer this question, it is proper to observe who were parties to the suit, and what were the matters submitted. Of the parties to the suit, some of the plaintiffs therein appear to have been adults *sui juris*, others married women joined with their husbands, and others infants suing by their next friends. The defendants were all adults. The matters submitted, are the several matters in question in the suit, and all disputes and differences between the adult plaintiffs, including the husbands and their wives, and the defendants in the suit. The matters in question in the suit must be taken to include the interest of the infant plaintiffs. Now, if an action had been brought, and a declaration framed, not upon the award, as has been done, but upon the submission to the award, it would have been necessary to allege a promise to perform the award, and to have shewn also a consideration for that promise, which must have been a promise or some other binding matter on the other side. Admitting for the sake of argument, *but no further*, that the consent of the attornies of such of the parties in the suit as were adult might be binding upon them, and equivalent to or evidence of a promise on their part to submit to and perform the award, and that this might have been a consideration sufficient to support the promise of the other parties to the suit, as far as regards the interest of the adult plaintiffs, how does it appear that any such consent was given, or promise made by or on behalf of the infant plaintiffs? The only consent shewn in the declaration, is the consent *of the attornies of the parties in the suit; but the infants cannot have had an attorney either in or out of the suit, and, therefore, no person representing them is alleged to have consented to the reference. And if, by the attornies of the parties in the suit, we are to understand the

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attornies of the next friends of the infants, can it be inferred merely from that character of attornies, that they had authority to bind their principals, the next friends of the infants, to answer and become personally bound for the infants' acquiescence under and performance of the award, and to be responsible if they should refuse to do so when they came of age, and should choose to open and reagitate the matter.

If we were to do this, we should impose upon the next friend of an infant an obligation far different from that which he takes upon himself when he consents to be named as next friend for the purpose of a suit.

We therefore think the Court cannot do this by inference only, as by the frame of the present declaration the Court is required to do. If in fact the next friends of the infants did take this obligation upon themselves, that matter ought to have been specially averred and shewn. Nothing of that kind is shewn, but the case is left to rest entirely on the consent of the attornies of the parties in the suit. There is a report of a case in the Court of Chancery very much resembling the present.† It was shortly noticed at the bar; I shall quote it more at length.

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Matters in difference were referred by consent and order of the Court, and an award made. Exceptions were taken to the award on one side, and the other side *prayed it might be decreed. The LORD CHANCELLOR‡ said, "when there is a reference by consent and order of Court, if it appear unequitable this Court will not decree it; and accordingly in this cause, set aside the award and bond of submission. The reason was, because it concerned an infant, to whom 450*l.* was awarded, and that bond should be given by the guardian that the infant should, at his full age, convey the lands in question, which is not reasonable; for he may die, or if he live to full age, may refuse to convey. It is not mutual." In like manner, we think the submission in the case now before the Court was not mutual. It is true, that we cannot say whether in fact the interest of the infants is affected by this award; but if the submission fails as to one important part, we think it cannot stand as to the residue. A person may be willing to submit a suit in equity, and all other

† Trin. Term, 28 Car. II., 1 Ch. Cas. 279.

‡ Lord Nottingham.

matters to reference, and yet not willing to submit other matters, and leave the suit to proceed. And upon this ground, without adverting to the other objections that were taken in the argument at the Bar, we think the plaintiff below has not shewn a good cause of action, and, consequently, that the judgment must be reversed.

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Judgment reversed.

SIR JOHN TYRRELL v. MARSH.†

(3 Bing. 31—39; S. C. 10 Moore, 305; 3 L. J. C. P. 138.)

By a marriage settlement an estate was limited to the use of husband and wife successively for life, with remainders over to the children of the marriage, and in default of issue, to the right heirs of husband and wife. There was a power in husband and wife to charge the estate during their lives, and a power to certain trustees, in whom the legal estate was vested, to sell on the direction of the husband and wife or the survivor.

The husband and wife borrowed money by way of annuity; created a term of 1,000 years, and levied a fine to G. in fee, which, by a deed to lead the uses, was declared to be "in trust to secure the regular payment of the annuity, and to corroborate the said term:"

Held, that this fine did not extinguish the trustees' power to sell under a direction as above.

1825.
May 3.
[31]

ASSUMPSIT for the purchase money of an estate called Collier's Hatch, in Essex, which the defendant had purchased of the plaintiff. At the trial before Graham, B., at the last Lent Assizes for that county, a verdict was found for the plaintiff, subject to the opinion of this Court on a case which stated, in substance, that by a marriage settlement of May, 1775, the estate in question *(subject to a charge of 1,500*l.* secured by a term of 1,000 years) was limited to the use of Francis Stuart and his assigns for life, *sans* waste, (with a limitation to William Tod and Thomas Cheap and their heirs during his life, in trust to support contingent remainders,) remainder to the use of Mary Stuart and her assigns for life *sans* waste, with a limitation to the said trustees and their heirs during her life, in trust to support contingent remainders, remainder to the children of the

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† Cited and distinguished by Lord ROMILLY, M.R. in *Alexander v. Mills* (1870) L. R. 6 Ch. at p. 127, n.;

39 L. J. Ch. 407, 409, where there had been an absolute sale by the life tenant of his interest.—R. C.

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marriage, in such shares as Francis Stuart and Mary his wife should by deed or will appoint, and for default of such appointment,

To the use of the children of the marriage as tenants in common in tail with cross remainders, and for default of such issue, to the use of such person as Mary Stuart, notwithstanding her coverture, should by deed, attested by two witnesses, or by will appoint, and for default of such appointment,

To the use of the right heirs of the survivor of Francis and Mary Stuart for ever.

And it was provided that Francis and Mary Stuart during their joint lives, or the life of the survivor, might charge the estate to the extent of 2,000*l*.

And it was further provided that it should be lawful for the said William Tod and Thomas Cheap, and the survivor of them, and the heirs of such survivor, at any time or times during the joint lives of the said Francis Stuart and Mary his wife, or during the life of the survivor of them, by the direction and with the approbation of the said Francis Stuart and Mary his wife, or of the survivor of them, to be testified by any writing or writings under their or either of their hands and seals to be attested by two or more credible witnesses, to make sale of or to convey in exchange, as therein mentioned, all, or any part or parts of the messuages, farms, lands, tenements, or hereditaments, which were thereby *limited to strict uses as aforesaid, with their appurtenances to any person or persons, whomsoever, for any such price or prices in money, or for such other equivalent in lands and hereditaments, as to the said William Tod and Thomas Cheap, or to the survivor of them, and his heirs as aforesaid, should seem reasonable; with full power, upon payment of the money which should arise by any such sale of the said premises, or of any part or parts thereof, to give and sign proper receipts for the same, which receipts should be a sufficient discharge to purchasers.

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Francis Stuart and Mary his wife, had one child, a daughter ; Mary Stuart survived her husband, and afterwards married James Stuart.

By a term of 1,000 years created in March, 1782, Mary Stuart

with the consent of her husband charged the estate with 2,000*l.*, borrowed of Alexander Wood, to whom the term was granted as a security.

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By an indorsement on the back of this deed, and bearing date April, 1783, Wood assigned this term to Elizabeth Gordon, of whom Stuart and his wife had then borrowed 2,000*l.*

And by indentures of lease and release of the same date, to which, among other persons, Stuart and his wife, Elizabeth Gordon and James Graham were parties, (stating that 1,000*l.* only, and not 2,000*l.*, had been paid by Elizabeth Gordon, and that she had paid it in purchase of an annuity of 95*l.*, to be paid by Stuart and his wife,

And reciting that Mary Stuart was entitled to the reversion of the premises expectant on the death of her daughter under age and without issue; and that for better securing the annuity to Elizabeth Gordon, Stuart and his wife had agreed to grant this reversion to Graham and his heirs, in trust for Elizabeth Gordon and her assigns,)

The premises were conveyed to Graham in fee, subject to the estate of Mary Stuart's daughter therein, and to the original charge of 1,500*l.* upon trust for Elizabeth Gordon and her assigns, to secure the regular payment of the annuity:

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And Stuart and his wife covenanted to levy a fine of the premises to the use of Graham in fee, for corroborating and strengthening the said term, and subject thereto to Graham and his heirs, upon the trust before mentioned.

Stuart and his wife duly levied a fine *sur conuzance de droit*, &c., to Graham, as of Easter Term in the 23 Geo. III., of the premises in question, in pursuance of the said covenant.

In 1793, by indentures of lease and release (attested by two witnesses), to which Tod and Cheap, Elizabeth Gordon, Graham, Stuart and his wife, and various other persons, who had joined in executing the before-mentioned indentures, were parties,

Reciting the indentures of 1775, 1782, and 1783, and the fine levied in pursuance thereof,

It was witnessed, that in consideration of 3,670*l.* paid by Sir W. Smyth, and by virtue and in execution of the power reserved to Mrs. Stuart by the indentures of 1775, but subject and without

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prejudice to the aforesaid power of sale and conveyance limited to Tod and Cheap, and the exercise thereof, and the uses thereby created, Mrs. Stuart directed and appointed, that if her daughter should die without leaving issue of her body, then after her daughter's decease and such failure of issue, the premises should remain, and the indenture of 1775, should operate to the uses thereafter limited; and Mrs. Stuart then directed Tod and Cheap to sell and convey the premises to the uses thereafter limited, and to exercise *the power of sale given them by the deed of 1775, and the fine levied in pursuance thereof. And Tod and Cheap did thereby sell and convey the premises to the uses thereafter limited, and Stuart and his wife, Tod and Cheap, and Graham, with the consent of Elizabeth Gordon, according to their respective interests, granted, bargained, sold, assigned, released, and confirmed the premises in question to Sir W. Smyth and his heirs, to hold to the several uses therein-after mentioned, which were such as Sir W. Smyth should appoint, &c. with the usual trusts to bar dower, and for default of appointment, to the heirs and assigns of Sir W. Smyth, to whom Elizabeth Gordon also assigned the residue of her term of 1,000 years, and remitted the annuity of 95*l*.

Sir W. Smyth devised the premises to the plaintiff and another, in fee, in trust to sell, and died in May, 1823.

Shortly afterwards the plaintiff contracted to sell the premises to the defendant.

The question for the opinion of the Court was, whether the fine levied by James Stuart, and Mary his wife, in or as of Easter Term 23 Geo. III., operated to extinguish or destroy the right or power of the said Mary Stuart, to consent to a sale of the settled estates under the power for that purpose contained in the said indenture of the 27th day of May, 1775, so as to prevent an exercise of such power of sale by the trustees of the same indenture; and if the Court should be of opinion that the said fine did not so operate, then the verdict found for the plaintiff was to stand; but if the Court should be of opinion that the said fine did so operate, a verdict was to be entered for the defendant.

Bosanquet, Serjt. for the plaintiff, relied on *Lord Jersey v.*

Deane,† to shew that the power in Tod and *Cheap was not destroyed by the fine of 1788. That fine was levied, and the deed to lead the uses executed for specific purposes, and could not have an effect contrary to the intention of the parties, which was only to secure the annuity to Elizabeth Gordon, without affecting the trustees' power to convey. They were not the conusors, but Stuart and his wife alone.

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[*36]

Taddy, Serjt. *contra* :

It is true that a fine which unexplained will have the effect of destroying powers, and divesting estates, may be controlled by the agreement of the parties, and the Court will so modify it as to further that intent: *Herring v. Brown*.‡ But in the deed to lead the uses of the present fine, no intent is expressed to preserve the power of the trustees, and to do so is rather inconsistent with the purpose of the conusors: it is not material that the trustees were not conusors to the fine, for their power was not one which they could exercise at their own pleasure or for their own benefit, but only in conjunction with Stuart and his wife, who were to put the power in motion. The power, therefore, was extinguished, unless an intention to preserve it can be collected from the deed to lead the uses of the fine. The object of the fine was to convey a fee to Graham and his heirs, with a view to secure the annuity to Elizabeth Gordon: the resulting trusts, if any, to Mrs. Stuart, cannot be looked at in a court of law; and in the deed to lead the uses, nothing is said about preserving the power, which distinguishes this case from that of *Lord Jersey v. Deane*, where the intention to preserve the power appeared in the declaration that the fine was to operate first for corroborating the uses in the antecedent settlement. But here the intention to give Graham *a fee might have been entirely frustrated if this power remained in the trustees, for they might then have exercised it on the direction of the conusors, notwithstanding the conveyance to him. It may be said the conusors intention was only to secure the annuity, but if they chose to carry that into effect by conveying a fee to Graham in such a manner as to destroy the power, their intention must be

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† 5 B. & Ald. 569.

‡ Carth. 22.

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pursued, however injudicious it may appear; and a fine uncontrolled by the expression of an intention to control it, has the effect of extinguishing all powers: *Herring v. Brown*, *Digges's case*,† *Albany's case*,‡ *West v. Berney*,§ *Smith v. D'Aeth*.||

BEST, Ch. J. :

This action was brought to recover damages for a breach of contract, by the defendant, in not purchasing an estate to which the plaintiff contends he has a good title; and that depends on the question whether or not the right to sell the estate has been destroyed by any act of Mary Stuart and her husband.

By the deed of 1775 a power of sale was given to certain persons, which could only be executed under the direction of Mary Stuart; but subject to this power, Mary Stuart and her husband had borrowed money of Elizabeth Gordon by way of annuity, to secure which a fine was levied, according to a deed drawn up to lead the uses. We need not now consider what would be the effect of a fine without any deed to declare the uses; what has been laid down on the subject in the first volume of Lord Coke's reports is not disputed on the present occasion; namely, that where there is no deed, a fine "thoroughly ransacks the estate." But here there is a deed, and we need not take up the law earlier than *the case of *Herring v. Brown*. The decision of that case in the Exchequer Chamber, upon which we shall now act, is consistent with justice, and has been confirmed by subsequent decisions; as by that of *Doe d. Odierne v. Whitehead*.¶ The principle laid down in that case is, that though the levying of a fine displaces existing interests, yet that where an accompanying deed shews with what object it was levied, the fine shall not destroy powers which it was the intention of the parties to retain. The intention of the parties in levying this fine was to secure the payment of an annuity to Elizabeth Gordon, and nothing else: the fee was not conveyed to Graham as a separate and independent estate, but merely to secure the annuity; it was only to exist during the life of

† 1 Co. Rep. 173.

‡ 1 Co. Rep. 110.

§ Sugd. on Powers, 80, 81,

3rd ed. 1821.

|| Ibid.

¶ 2 Burr. 704.

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Elizabeth Gordon, and on her death was to return to the Stuarts. It has been urged that a court of law cannot take notice of a resulting trust. But upon the death of Elizabeth Gordon, the estate would be at once in Mrs. Stuart again, under the operation of the Statute of Uses, and recourse to a court of equity would not be necessary. An attempt has been made to distinguish this case from that of *Lord Jersey v. Deane*, because there the object of the parties was expressly stated in the deed; but it is equally clear here, upon the whole of the instruments taken together, that the intention of the parties was to limit the operation of the fine, and prevent the destruction of the power.

PARK, J. :

The only difficulty here has arisen from the number and length of the deeds; but when the deed of 1783 is considered, there is no room for doubt. It is clear from all the cases that the intentions of the parties must govern the operation of a fine, which if it be uncontrolled, will certainly effect the destruction of *powers; but it may always be controlled, where the intention of the parties to that effect can be collected, according to the case of *Herring v. Brown* confirmed in *Doe d. Odiarne v. Whitehead*. In the present instance the parties had no purpose but to secure the annuity, which was the express object of the conveyance to Graham. And when the trust in favour of Elizabeth Gordon was executed, the property was to be again at the disposition of Mrs. Stuart.

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BURROUGH, J. :

Every fine acknowledges the land comprised in it to be the land of the conusee, so that a power annexed is gone, if there be no deed to declare or lead the uses; but if there be such a deed, it is the same thing as if it were inserted in the fine: the two constitute one conveyance; must receive one construction, and transfer a unity of interest. Even when the deed has been executed at a different time, the Courts have gone a long way to make the fine subservient to it; and we cannot now say that the fine, in this case, shall operate one way, and the deed to lead the uses another.

GASELEE, J. concurred.

Judgment for the plaintiff.

1825.
May 11.
[71]

WILLIAMS AND OTHERS v. RAWLINSON.†

(3 Bing. 71—78; S. C. 10 Moore, 362; 3 L. J. C. P. 164; S. C. at Nisi Prius, Ryan & Moody, 233.)

T. having a banking account with plaintiffs, on which he was indebted to them 10,000*l.* in 1822, defendant then executed a bond, conditioned to secure plaintiffs for any sums which for ten years plaintiffs should advance on bills, &c. which T. should from time to time draw on them or make payable at their house, and all cheques, &c. not exceeding 5,000*l.* in the whole. It was agreed that this bond should not affect a prior security given to plaintiffs by T. in 1817; but no notice was given to defendant by plaintiffs that T. was indebted to them 10,000*l.* at the time the defendant executed his bond; T., however, saw the accounts every fortnight, and received the vouchers half-yearly.

At the close of his account, T. was indebted to the plaintiffs more than 10,000*l.*, but subsequently to the executing of the defendant's bond he had paid into the plaintiff's bank more than 5,000*l.* :

Held, that the defendant was liable to the extent of 5,000*l.*

Held, also, that the defendant's bond did not require a 2*5l.* stamp.

ONE Threlfall having a banking account with the plaintiffs, bankers in London, and being indebted to them on that account 10,247*l.* 9*s.* 1*d.*, under a balance struck in January, 1822, the defendant and others then executed to the plaintiffs a bond on a 9*l.* stamp, in the penal sum of 10,000*l.*, the recital to the condition of which bond stated, that the said John Threlfall had for some time past had a banking account with the obligees; that the defendant and others had agreed to join Threlfall in the above bond, for the purposes and on the conditions thereunder written; and that it had been expressly agreed between the above parties, that such bond should not in anywise prejudice or affect a certain bond bearing date the 29th day of November, 1817, which was executed and given by the said John Threlfall and others to the above obligees, and their late partner William Moffatt, the younger; but that all rights and remedies under or by virtue thereof, should remain in full force and effect;

And the condition was, that if Threlfall, his heirs, executors, or administrators, should from time to time and at all times thereafter reimburse to the obligees or the *survivor of them, and every other person who should become partner with them in the

† Cited and applied by Lord Terry (1884) 25 Ch. Div. 692, 704; SELBORNE, L. C. in *Re Sherry*, 53 L. J. Ch. 404, 407.—R. C. London and County Banking Co. v.

banking business, their executors or administrators, all and every sum and sums of money, which the obligees or the survivor of them, or any partner in their banking-house, should within ten years thereof advance or pay, or be liable to advance or pay on account of accepting, indorsing, discounting, paying or satisfying any bill or bills of exchange, drafts, notes, orders, or other engagements whatsoever, that the said Threlfall should from time to time draw or cause to be drawn on them, or make payable at their banking-house; and also all other sums of money which the obligees or the survivor of them, or any partner in their banking business, should lay out or advance or become liable to pay on the credit of Threlfall or on his account, and all such charges and allowances for advancing and paying such bill or bills, drafts, notes, acceptances, advances, payments, engagements, and accommodations, not exceeding the sum of 5,000*l.* in the whole, together with interest for such sum and sums of money as they or any of them should at any time within the period aforesaid be in advance on account of Threlfall, as is usually charged by bankers in such and the like cases; and should from time to time and at all times within the period, and to the amount aforesaid, indemnify the obligees or the survivor of them, or any partner in their banking business, from all actions, suits, losses, costs, charges, expences, and demands which should be occasioned by their accepting, indorsing, discounting, paying, &c. for Threlfall as aforesaid, then the bond was to be void.

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RAWLINSON.

In an action on this bond, the breach of condition suggested, was, that after the making of the bond in January, 1822, and before the commencement of this suit, the plaintiffs had advanced and paid, and were liable to *advance and pay a large sum, to wit, 20,000*l.* for accepting, indorsing, discounting, paying, &c. bills, &c. which Threlfall during the time last aforesaid had drawn upon and made payable at their banking-house; and that they had otherwise laid out and were liable to pay on the credit of Threlfall other sums to a large amount, to wit, the amount of 10,000*l.* and that the charges and allowances upon such payments, &c. at the rate usually charged by bankers, amounted to a further large sum, to wit, 5,000*l.*; that the several sums so advanced and paid, and the charges upon them, amounted to a large

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WILLIAMS sum, exceeding the sum of 5,000*l.*, to wit, to 35,000*l.*, of which
RAWLINSON. premises Threlfall had notice, and yet neither he, the defendant,
nor the other obligors, had reimbursed the plaintiffs the 5,000*l.*

At the trial before Best, Ch. J., Guildhall sittings after Hilary Term last, it appeared that subsequently to the execution of the bond in 1822, the plaintiffs had continued their advances to Threlfall, and at the close of the account afterwards, upon his becoming bankrupt, he stood indebted to them 10,792*l.* 12*s.* 11*d.* But subsequently to the first advances to the extent of 15,000*l.* after the execution of the bond, he had paid into the plaintiff's bank more than the sum of 5,000*l.*; and it did not appear that at the time of executing the bond the defendant had received any notice that Threlfall then owed the plaintiff 10,247*l.* 9*s.* 1*d.* Threlfall, however, saw the accounts every fortnight, received the vouchers half-yearly, and knew how the payments were applied.

The jury found a verdict for the plaintiffs for 3,978*l.* (1,022*l.* having previously been paid on account), subject to a motion to be made to this Court to reduce the amount to 485*l.* 2*s.* 10*d.* (the difference between the first balance above mentioned and the last), if the Court should think fit.

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Cross, Serjt. accordingly moved for a rule *nisi* to that effect, on the ground, first, that if this bond were intended to secure successive advances of 5,000*l.* each, to an unlimited extent, it ought to have had a 25*l.* stamp. Secondly, that however the law might be as between the creditor and the debtor, yet, as between the creditor and the surety, (who was ignorant of the debt of 10,247*l.* 9*s.* 1*d.* outstanding at the time of his executing the bond), and according to the true construction of the bond, the sums paid in by Threlfall after the execution of the bond, ought to be applied, first, in liquidating advances made also after the execution of the bond, and not to the preceding debt of 10,247*l.* 9*s.* 1*d.*; and that the bond was intended to cover only one advance of 5,000*l.*

The Court said there was nothing in the first objection, but granted on the second a rule; against which

Wilde, Serjt. now shewed cause, and referred to *Clayton's* case,† *Brooke v. Enderby*,‡ and *Bodenham v. Purchase*,§ to shew that either the creditor or the debtor must have applied the sums paid after the execution of the bond to the liquidation of the sums advanced after that time, in order to enable the surety to say that they had been so applied; when the Court called on

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Cross to support his rule :

He urged, that the principle with respect to the application of payment by creditor or debtor did not apply to this case, in which the chief question was, what was the intention of the plaintiffs and defendant as far as it could be collected on the face of the bond. The intention was, that the defendant *should give security, not for a past, but for a future account; this appeared from the recital, which referred only to future accounts, and which expressly stated that the new security should not prejudice the old one already in the plaintiff's hands, whence it must be inferred that the old debt was to be covered by the old security. In *Bodenham v. Purchase*, the intention to secure the old balance was expressly stated, but the banking account contemplated by these parties, was an account to commence from the time of executing the bond; and as against the defendant, the plaintiff had no right to alter that mode of accounting without the defendant's consent. The defendant, too, was a surety; a species of insurer, in whose case all the rules of insurance apply, and if there be any misrepresentation or any concealment, no claim can be made against him. In *Pidcock v. Bishop*, (K. B. Hilary Term last,)|| the plaintiff refused to supply a customer with certain iron, unless he procured the guarantee of the defendant. The defendant having given his guarantee, the plaintiff, in order by that means to cover an old debt due to him from the customer, charged the customer for the iron, a sum far beyond the regular price; and it was holden, that this contrivance exonerated the defendant from his guarantee: in the present case it no where appears that the plaintiff apprised the

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† 15 R. R. 161 (1 Mer. 572).

§ 20 R. R. 342 (2 B. & Ald. 39).

‡ 22 R. R. 653 (2 Brod. & Bing.
70; 4 Moore, 501).

|| 27 R. R. 430 (3 B. & C. 605; 5
Dowl. & Ry. 505).

WILLIAMS ^{r.} defendant of the fact, that Threlfall was already 10,247*l.* 9*s.* 1*d.*
RAWLINSON. in their debt, and that his first advances must be applied to
liquidate that sum, which, if they had done, it is possible the
defendant might have declined to enter into the bond.

BEST, Ch. J. :

[*76] On the part of the defendant, this case has been put on the
only ground which it was possible to urge. If I could collect on
the face of the bond, that it was intended that the various sums
paid in to the plaintiff's bank by Threlfall, subsequently to the
execution *of the bond, should go to the new account, the defen-
dant would be entitled to make his rule absolute. But the
contrary appears; and it was impossible for the plaintiffs to
have entered into such an agreement, for had they done so, the
10,000*l.* already due might never have been paid, and in the
absence of any agreement touching the debts to which the
subsequent payments were to be applied, the plaintiff had a
right to apply them first in discharge of the earlier account.
The bond recites, that Threlfall had had a banking account with
the obligees, and that the defendant and others had agreed to
join Threlfall in the bond for the purposes and on the conditions
therein contained, and that it had been agreed that the bond
should not prejudice a prior bond given by Threlfall to the
obligees;—These words are not very clear, but I cannot collect
from them any agreement, that money subsequently received
should not be applied in discharge of the prior debt. When the
money was paid, nothing was said as to the account to which it
was to be applied, and if the two accounts were blended, the
course of business is to apply the payments to the earlier; that
is the principle laid down in *Clayton's* case, and confirmed
in *Bodenham v. Purchase*; but here, the accounts must have
been blended, for the defendant's principal agreed to such an
application of his payments; his accounts were settled half
yearly, and he must have seen that the remittances subsequent
to the bond had been applied to the 10,000*l.* If so, *cadit questio*;
for, unless by distinct agreement, the surety can have no control
over the way in which the principal shall make his payments,
and no such agreement appears on the face of the bond. The

case of *Pidcock v. Bishop*, as it has been stated, does not apply to the present, for the whole transaction between the creditor and the debtor was a direct fraud upon the surety, and there is no pretence for imputing fraud to the present plaintiffs. It has been argued, that the defendant's *undertaking is analogous to an insurance; a transaction, in which, according to Lord MANSFIELD, there must always be *uberrima fides*; but the same learned person, upon the occasion in which he established that position, referred also to the maxim, *aliud est tacere, aliud celare*. But there has been nothing like an improper concealment in this cause; it might have been pleaded, if there had; the bond was expressly given for the continuance of an old banking account, and it is well known that such accounts are not carried on till the old balance has been secured.

WILLIAMS
*
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PARK, J. :

There is no colour for reducing the verdict which has been given; if the defence had been founded on fraud or undue concealment, the result might have been very different; and in *Pidcock v. Bishop*, as the case has been stated to us, the decision of the Court must have turned on the fraud practised on the surety. In the present instance nothing has been done which was not warranted by the course of business.

BURROUGH, J. concurred.

GASELEE, J. :

I feel considerable difficulty in this case, and am not prepared to say that the judgment the Court is pronouncing is altogether satisfactory to me; but I can find no authority the other way, and therefore concur in the decision we have come to. The bond was to run for ten years. Threlfall was to commence a new account; and it is not clear that it was not the intention of the parties that all sums paid in by him subsequently should be carried to that account, or that the partners should rely on the old securities for the payment of the old account; but I can see no agreement on the part of the bankers to let the payment of the 10,000*l.* stand by for so many years; and if there had been

WILLIAMS any undue concealment on that head, it might have been
RAWLINSON. r. pleaded. *Had the bond clearly stated the existence of the
[*78] former balance, there could have been no difficulty ; but even as
the case stands at present, the defendant's rule must be

Discharged.

Cross then moved in arrest of judgment, that, according to the terms of the bond, the plaintiffs were not to allow Threlfall to be more than 5,000*l.* in their debt at one time ; whereas it was averred that he owed them a sum *exceeding* 5,000*l.*, to wit, 35,000*l.* at the time of the action. If they had limited their credit to 5,000*l.*, as the defendant intended, Threlfall might never have been involved in difficulty, and the defendant never have been called on. He might have known enough of Threlfall to be willing to trust him with a limited credit of 5,000*l.*, but might have foreseen, as he had refused to incur, the risk of a more extended credit.

But the Court thought there was nothing in the objection, the meaning of the bond being clearly that whatever the plaintiffs advanced, the defendant would contribute 5,000*l.* towards indemnifying them ; and

Cross took nothing.

DUNNE *v.* ANDERSON.†

(3 Bing. 88—101; S. C. 10 Moore; S. C. at Nisi Prius, Ryan & Moody, 287.)

Plaintiff, a surgeon, petitioned Parliament against quacks.

Defendant, a journalist, commented severely on the contents of the petition, and charged the plaintiff with ignorance of his profession, pointing out ignorance of chemistry, which, he said, appeared on the face of the petition.

Plaintiff then sued defendant for libelling him in his profession of a surgeon; the judge directed the jury, that if they considered the defendant's attack a fair comment on the plaintiff's petition, if the charge of ignorance was collected from the petition alone, and was not the spontaneous effusion of malice in the defendant, the writing in question was no libel; he also directed them to consider whether the defendant had imputed to the plaintiff ignorance in his profession of a surgeon or ignorance of chemistry, for if they thought the latter, the declaration was not adapted to the plaintiff's case.

The jury having found a verdict for the defendant, the Court granted a new trial, costs to abide the event.

Quære, Whether a petition to Parliament on matters of general importance is such a publication as renders the petitioner an object of fair criticism and comment.

THE declaration stated that plaintiff, long before and at the time of the publishing the libels by defendant thereafter mentioned, was and still is a surgeon, and the profession of a surgeon used, exercised, and carried on, to wit, at Westminster, in the county of Middlesex, and in the course and exercise of such his profession, had always conducted himself with great skill, knowledge, fairness, regularity, and ability, and had not only never been guilty of quackery, empiricism, puffing, and humbugging, or other dishonorable, unlawful, or disgraceful practices, but, until the time of publishing the libels thereafter mentioned was never suspected of having been guilty of such practices, or any of them; and by means of the premises was daily acquiring great gains and profits in the way of his said profession, to the comfortable support of himself and his family, and the great increase of his riches, and had acquired and enjoyed the friendship, good opinion, regard, and esteem of all his neighbours, patients, and other good and worthy subjects of this realm, to wit, at, &c. &c.

† Cited by WILLES, J. in his (1872) L. R. 7 C. P. 606, 622; judgment in *Hemwood v. Harrison* 41 L. J. C. P. 206, 214.—R. C.

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That before and at the time of committing the grievances thereafter mentioned, plaintiff was and *still is a member of the Royal College of Surgeons in London ;

That before that time plaintiff had established, set up, and carried on, and still did carry on, in Regent Street, Westminster, a certain establishment by and under the name of the Athenée and Royal Institute, a branch of the Athenaion, from the carrying on of which he was daily deriving sundry great gains and profits ;

That before that time plaintiff had presented to the Honorable the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled, a petition for, among others, certain purposes, to wit, for its parliamentary sanction and legislative authority against the practice of empiricism in England, for supporting the just privilege of real professional merit, for enforcing the honest discharge of their duty by medical persons towards the public, and to associate the profession to give gratuitous advice in the different districts or counties, by branches, on the same plan as pursued in the National Vaccine establishment : yet the defendant, well knowing the premises, but contriving, and wrongfully and maliciously intending, wilfully and maliciously to injure plaintiff, not only in his said profession of a surgeon, but in his general character ; to destroy his good name, fame, credit, and reputation ; to bring him into great public scandal, infamy, and disgrace with and amongst all his neighbours, patients, and other good and worthy subjects of this realm ; and to cause it to be suspected and believed by those neighbours, patients, and subjects that plaintiff was a quack and empiric, and had been and was guilty of the offences and misconduct thereafter mentioned, and to vex, harass, and oppress, him, theretofore, to wit, on, &c., at, &c., falsely, wickedly, and maliciously did publish, and cause and procure to be published, of and concerning plaintiff, and of and concerning him as a surgeon as *aforesaid, a certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, libellous, and defamatory matter following of and concerning plaintiff, and of and concerning him as a surgeon as aforesaid, that is to say,

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“Humbug petition to Parliament; (meaning said petition of plaintiff), a Mr. Dunn, of Regent Street (meaning plaintiff), has taken up the idea started by us, and petitioned Parliament to abolish quackery and the sale of patent medicines. Had this been a genuine straight forward thing, we should have been the first to hail it as a symptom of reform in the grossest of our national grievances. Had it been, in short, a petition from the people, who suffer in purse and person by the legal robberies of quacks, legitimate and illegitimate, it would have been all very well. But coming thus, in the shape of a humbug puff (meaning that said petition was a humbug puff) from an unknown and an ignorant man (meaning plaintiff), who has set up a Royal Medical Institute (meaning said Athenée and Royal Institute, set up in Regent Street aforesaid) in rivalry of Jordan’s Medical Establishment, or Nisbet’s Army Board, or Eady’s Soho concern, or Kiernan’s Humbug in Leicester Square, (meaning certain quack and empirical establishments before then established, set up, and carried on by divers persons, and meaning that the said establishment of plaintiff was an establishment of the same description as the said various quack and empirical establishments aforesaid), we must pause. This petition (meaning said petition of plaintiff) indeed is the most barefaced puff we recollect to have ever seen, and by a person (meaning plaintiff) who, though he may have passed muster at the College (meaning the Royal College of Surgeons in London) after paying his guineas, is profoundly ignorant of the science of his profession, (meaning the said profession of a surgeon, which he plaintiff so used and *exercised and carried on as aforesaid,) and would be put to the blush by any one of the quacks whom he evidently wishes to rival. We should not hesitate to match against his (meaning plaintiff’s) chemical knowledge either Eady, M’Donald, (meaning certain quacks and empirics,) or the quack letter-puffer of the French tonic wine; (meaning a certain quack medicine called or known by the name of the French Tonic Wine;) and yet has this Mr. Dunne (meaning plaintiff,) a member, as he tells us, of the Royal College of Surgeons, the assurance to come before the House with a petition, praying the abolition of all quack medicines until they shall have been

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analysed. As for his college membership, we hold that cheap; as Taylor and Son, Caton, Goss, & Co., and many others equally notorious, can claim, we understand, the same distinction. But you must hear the humbug petitioner (meaning plaintiff) himself, to understand the very deep knowledge which is possessed by a member of the Royal College of Surgeons. 'On the Continent no medicines (similar to those with us called patent) are permitted to be sold without first having been analysed by the constituted chemical authorities, and duly examined by the respective faculties of medicine. If this plan were adopted in Britain, your petitioner humbly submits many valuable lives would be saved annually, and not one-twentieth of the miserable objects would be found in our streets, or in our hospitals, as at present, and this might be effected without lessening materially the revenue produced by such poisonous means; for the reporters would naturally limit the use of such medicines to those diseases only in which they would be useful, and they would also prevent any improper article being introduced into the composition.' After this display of chemical ignorance by the College Member (meaning plaintiff) we would scarcely add a word: it is only

[*92] matched by the grammatical blunders which *abound in this parliamentary puff, (meaning said petition of plaintiff,) as we may call it, of his Royal Medical Institute. Pray may we ask this analyser of quack medicines (meaning plaintiff) what test he has discovered for hemlock, digitalis, hellebore, aconite, night-shade? And not to go into the dark regions of vegetable chemistry, may we ask him what analysis he can make of James's Powder? We advise him (meaning plaintiff) to try to get an engagement in the Tonic Wine establishment, (meaning a certain quack or empirical establishment for the sale of a certain quack medicine called or known by the name of Tonic Wine,) to write puff letters for the concern, (meaning said last-mentioned quack or empirical establishment,) as it seems much more in his (meaning plaintiff's) line than chemical analysis, of which, according to his own evidence, he knows nothing."

The defendant pleaded the general issue.

At the trial before Best, Ch. J., at the last Middlesex sittings, the plaintiff proved the publication of the alleged libel by the

defendant in a periodical journal, of which he was the proprietor. And also that he persisted in selling it, and in refusing to disclose the author's name, notwithstanding a remonstrance by the plaintiff.

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It was also proved that the plaintiff was a member of the Royal College of Surgeons; it did not appear, however, that he was practising as a surgeon, but that he was proprietor of an establishment in Regent Street, Westminster, called the Athenaeon, the precise objects of which were not distinctly shewn; but it seemed that lectures of various kinds had been given there, and that, in some way connected with it, an entertainment, consisting partly of music, and partly of poetry or lectures, had been announced at the Argyle Rooms in the same street.

The plaintiff's petition to the House of Commons, which it was proved had been read there, was as follows:

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"To the Honourable the Commons of the United Kingdom of Great Britain and Ireland, in Parliament assembled.

"The humble Petition of Charles Dunne, member of the Royal College of Surgeons in London, subscribed by other members of the same College,

"Sheweth,—That the present charter, whereby the functions and privileges of the members of the Royal College of Surgeons in London are regulated, so far from protecting regularly bred practitioners, often subjects them to injury and insult, by the tolerance of ignorant, disqualified, and unworthy persons, to practise the art and science of surgery in the very heart of our metropolis; the college, though a chartered body, not being authorised to prevent any person whatever from practising surgery, although it possesses sufficient power to punish its own members for any breach of its bye-laws.

"That for the better protection of the public and the community at large against the immorality and the horrors daily committed by quack doctors, and to secure the medical profession in general in its rights and immunities, as well individually as collectively, it is become necessary (from the extraordinary inundation of audacious empirics, who, of late years, have so shamelessly assumed the professional character) that an application be made to Parliament for arresting the progress of so much

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moral turpitude in a country, whose laws are supposed to flow spontaneously to meet anticipated wrong.

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“That, with a view to remedy, as much as possible, the baneful effects of medical quackery (practised by the very dregs of the people) it is amongst other things intended, that stations, after the plan of the National *Vaccine Establishment, shall be formed in various districts throughout the kingdom, where three members at least of the Royal College of Physicians and Surgeons in London shall attend every morning to give advice, without remuneration, to the indigent of both sexes, and that the institution, for these and other reasons equally cogent and irresistible, shall be intitled ‘The Royal Medical Institute.’ That one of the principal objects of this society be to preserve the dignity and just privileges of the respective classes of the physician, the surgeon, and the apothecary, and to support the credit of those persons who honourably demean themselves in their respective branches, to promote useful and scientific communications, and fair and honourable practice, to prevent abuses in the profession, to punish pretenders to it, and to adopt such other measures as may be best calculated to ensure respectability to its members, and advantage to the community.

“That during ten years’ extensive practice on the continent of Europe, your petitioner never heard of any quack doctor being tolerated for an instant; on the contrary, if it were found that even any member of the profession acted in any way derogatory to his professional character, he would be immediately handed over to justice, to be dealt with according to a specific law in the Code Napoleon, for the punishment of medical men and impostors pretending to medical knowledge. Your petitioner further humbly begs leave to observe, that, however speculation may be allowed to extend and ramify itself in other concerns of life, it should never be permitted in a well regulated government, in what regards the health and lives of our fellow creatures. Your petitioner has every reason to believe that, at the most moderate calculation, several thousands of lives are annually sacrificed through the ignorance and improper treatment of quack doctors, not to say any thing *of the numerous miserable objects of

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disease in our streets and in our hospitals, the effects of their deadly nostrums.

“ That the malpractices of quack doctors are wisely guarded against in every country of Europe, except Britain; for no person (under pain of fine and imprisonment,) is allowed to take the charge of the sick, or even to direct the application of medicines, without having gone through the proper ordeals of examination as to his professional knowledge and acquirements. In England it is notorious that we have not only carpenters, tailors, bricklayers’ labourers, lead-pencil-makers, Jews old clothes men, journeymen linendrapers, and men of colour, but even women quacks, who practise their duplicities on the unwary and unthinking part of the public, by plundering all those who have the folly to approach them, whilst many are absolutely deprived of life by them, and others, who have the misfortune to escape death, are left to drag on a miserable existence with an entirely broken constitution for the remainder of their days. The baneful effects too of patent medicines, as they are called, deserve particular notice, the composition of which is formed in such a manner as to render their administration at all times dangerous, and but too often fraught with death: whereas on the continent no medicines (similar to those with us called patent) are permitted to be sold, without first having been analyzed by the constituted medical authorities, and duly examined by the respective faculties of medicine.

“ That if this plan were adopted in Britain, your petitioner humbly submits many valuable lives would be saved annually, and not one twentieth of the miserable objects would be found in our streets, or in our hospitals as at present; and this might be effected without lessening materially the revenue produced by such poisonous means,—for the reporters would naturally *limit the use of such medicines to those diseases only in which they would be useful, and they would also prevent any improper article being introduced into their composition. Your petitioner, however, whilst he acknowledges that there are efficacious remedies for some few diseases, the mode of whose operation by which they cure is unknown, and such remedies are called specifics, as arsenic and cinchona in intermittents,—mercury

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in and sulphur in psora, denies that quack medicines not composed of these ingredients, and applied in those diseases just mentioned, have any specific effects, and even if they had, he humbly submits, nevertheless, that it would not only be repugnant to reason, but prejudicial to society, to give a latitude to the unlearned, ignorant, unworthy and unprincipled quack, to do mischief by those pretended specifics for different maladies, which have no foundation in fact: and whilst it shows the freedom of our laws in this respect, it affords an opportunity to those impostors to commit every species of fraud and depredation on the public, particularly to the ruin both of the pocket and constitution of the lower classes, always eager to flock for relief to those daring empirics, whose trade it is to hold out extraordinary promises to their dupes of their cures, which they know themselves totally unable to perform.

“Your petitioner therefore most humbly prays that this Honourable House may, in its wisdom, rescue the English nation from the obloquy thrown upon it by foreigners of all nations, of being a nursery for those vipers denominated quack doctors, by making a law, rendering it a misdemeanour for any person (for the sake of gain or reward) to prescribe for the sick, without the necessary qualification of a diploma, and enable the present Institute to prosecute to conviction disqualified persons so prescribing; or to adopt such other measures as may tend to eradicate this great evil, as in *the superior judgment of this Honourable House may seem meet.

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“And your petitioner, as in duty bound,
will ever pray,

“CHARLES DUNNE.”

“164, Regent Street, 10th May, 1824.”

BEST, Ch. J. told the jury, that if the publication complained of was a libel, it was aggravated by the defendant's conduct at the time of the plaintiff's remonstrance; it was, however, for the jury to consider whether that publication was a malicious and wanton attack upon the private or professional character of the plaintiff, or whether it was no more than a fair comment on the plaintiff's petition to the House of Commons. If the writer,

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without any ostensible cause for an attack, had come forward, as of his own knowledge, to impute to the plaintiff ignorance in his profession of a surgeon, that would have been a libel for which, unless justified by proof of its truth, the writer would have been liable to answer in damages. But if he had not imputed ignorance to the plaintiff, except in so far as he had collected the existence of ignorance from the contents of the plaintiff's petition; if the attack was only through the sides of the petition, and not spontaneous; in short, if what had been written was no more than a fair comment on that petition, the defendant was entitled to a verdict; for where a man obtruded himself on the public by proposing measures to affect the interests of the community at large, his proposals were legitimate objects of observation and criticism; and, if professing to instruct and reform the world, he manifested an incompetence for the task he chose to impose on himself, there could be no offence in warning the public against the incapacity of such a self-constituted instructor. The *jury would also consider, whether the ignorance which the alleged libel imputed to the plaintiff, meant ignorance in his profession of a surgeon, or ignorance in the profession of a chemist; for if they should be of opinion that the ignorance imputed, meant ignorance in the profession of a chemist, their verdict must be for the defendant, inasmuch as the charge in the declaration was only for imputing ignorance to the plaintiff in his profession of a surgeon.

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The jury found a verdict for the defendant.

Vaughan, Serjt. moved for a rule *nisi* to set aside this verdict and have a new trial, on the ground, first, that the alleged libel clearly imputed to the defendant ignorance in his profession of a surgeon; and, secondly, that a petition to the House of Commons was a communication so far privileged as to protect the petitioner from action or prosecution for libel by reason of any allegations contained in it (*Lake v. King*);† and therefore could not be deemed such a publication or obtrusion of the petitioner upon the notice of mankind, as to justify them, according to the principle of *Carr v. Hood*,‡ in making him the object of criticism or comment.

† 1 Saund. Rep. 131.

‡ 10 B. R. 701, n. (1 Camp. 355, n.).

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PARK, J. said, he could not see that the present case fell within the principle of *Carr v. Hood*, as he was not prepared to say that a man who presented a petition to Parliament placed himself in the situation of a publisher: the alleged libel also clearly imputed to the plaintiff ignorance in his profession of a surgeon.

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BURROUGH, J. thought that ignorance in his profession of a surgeon was manifestly imputed to the *plaintiff, and that, if the fact of his practising was not disputed, the jury ought not to be permitted to find a verdict against him.

GASELEE, J. also thought there was sufficient ground for a rule nisi, which was granted accordingly.

Spankie, Serjt. now shewed cause against the rule, and after exposing the solecisms and ignorance of the common rules of grammar conspicuous on the face of the petition, contended, that, taking the whole of the alleged libel together, it only proposed to impute to the plaintiff ignorance of chemistry, when it stated, that “ he is profoundly ignorant of the science of his profession, and would be put to the blush by any of the quacks whom he evidently wishes to rival;” for the very next sentence explained the foregoing, by adding, “ we should not be afraid to match against his chemical knowledge, Eady,” &c. ; and then, after an extract from the plaintiff’s petition, the writer proceeded, “ after this display of chemical ignorance by the College member,”——

He then argued that the construction of an alleged libel, and the ascertaining the motives with which it was published, was a compound question of law and fact, exclusively within the province of the jury ; and that, therefore, a new trial ought not to be granted, because the Court might happen, in construing the writing in question, to draw a conclusion different from that to which the jury had come ; for supposing the writing did impute to the plaintiff ignorance in his profession of a surgeon, yet if this were done without malice, and in fair comment upon the plaintiff’s own productions, (a matter of fact which the jury alone were competent to ascertain,) there could be no ground for a new trial where the jury, as here, had determined that *such was the

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fact. Admitting that the presentation of a petition to Parliament, or to an officer of state, (*Fairman v. Ives*,)† was not such a publication as would subject the petitioner to proceedings for libel on account of any allegations contained in the petition, yet, if the petition related to matters affecting the community at large, it was a publication that invited and justified fair criticism more than any other. If, according to the principle laid down in *Carr v. Hood*, the author of a book on ordinary topics became, by publishing it and offering himself to the notice of mankind, a fair object of criticism and comment, much more so did the author of a petition to the Legislature, proposing measures extensively affecting the interests of the community. It was of the utmost importance not only that such measures should be fully and freely examined, but that the proposers of them should be exposed, if by a manifestation of weakness and ignorance they proved themselves incompetent to the task they had undertaken; such pretenders were the most dangerous enemies of improvement, by deterring men of real talents and knowledge from presenting themselves to the notice of the public, and it was therefore not only permissible, but a duty in every journalist to expose their ignorance.

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(GASELEE, J.: That argument might perhaps apply, if the alleged libel had been a counterpetition to the Legislature.)

There was nothing in the present publication from which malice could be inferred, and the Court would not grant a new trial where it was not likely 20*l.* damages would be recovered: *Marsh and Ux. v. Bower and Ux.*†

Vaughan supported his rule upon the grounds on which it had been obtained, and the Court, without expressing any further opinion, made the rule absolute; the costs of the former trial to abide the event of the new trial.

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Rule absolute.

Upon the second trial the plaintiff recovered one farthing damages.

† 24 R. B. 514 (5 B. & Ald. 642;
1 Dowl. & Ry. 252).

† 2 W. Bl. 851.

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STEAD, DAKER, JACKSON, WAINWRIGHT, AND
SOWDEN *v.* SALT.†

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(3 Bing. 101—104; S. C. 10 Moore, 389; 3 L. J. C. P. 175.)

Partnership in a trading firm does not of itself constitute an implied authority for one partner to bind the others by a submission to arbitration, even of matters arising out of the business of the firm.

THE five plaintiffs declared against the defendant for work, labour, and materials, and on the common money counts.

The general issue was pleaded; and at the trial before Bayley, J., York Lent Assizes, 1825, the defendant put in an award upon the matter touching which the action had been brought. The articles of agreement, however, which contained the submission, were signed in the first instance only by the defendant Salt, and the plaintiffs Stead, Daker, and Jackson. The time limited in them having expired without any thing being done, they were signed a second time with altered dates by Stead, who added the words, “for ourselves and partners, William Wainwright, Isaac Sowden.”

It appearing that the plaintiffs were not general partners, but partners only in the dealings to which the award referred, the learned Judge thought the instrument of submission insufficient; and a verdict was taken for the plaintiff, subject to an application to this Court to set it aside and enter a nonsuit, on the ground of the defect in the submission.

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Pell, Serjt. obtained a rule *nisi* to this effect, on the ground that there was no difference between the incidents of a general partnership and a partnership in a particular transaction; that a payment to one of several partners would operate as a discharge of a debt due to the whole firm; that a release of such a debt, executed by one of several partners, would be valid against the others; as also a release of an action; that an admission by one of several partners would be equally binding on the others; that each partner had authority to act for the firm in all matters relating to the business carried on by them; and that although an authority could not be implied to one of them to bind the others by a submission to arbitration on matters foreign to such

† See now the Partnership Act, 1890, s. 5.—R. C.

business (*Sandeland v. Marsh*),† yet a submission to arbitration on matters arising out of it, seemed to be as much within the scope of the partnership authority, and as necessary to its success, as the ordinary conduct of their trade.

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Vaughan and *Wilde*, Serjts. for the plaintiffs relied on Com. Dig. Arb. D. 2. “If there be a controversy between A. of the one part, and B. and C. of the other, and B. submit for himself and C., and there be an award that B. shall pay, this is good, though C. be a stranger. So if B. submit for himself and his partner;” from which they argued that B.’s having been holden singly liable, must have proceeded on the ground that his engagement did not bind his partner: they referred to *Strangford v. Greed*‡ as an authority to the same effect: urging that the executing a submission to refer to arbitration was not an act within the ordinary course of business, but a delegation of an authority, and that an award might call on the partners to perform acts which by law they could not be called on to perform; as to *execute deeds, &c. That they could not revoke the authority which had been given, and, therefore ought not to be bound by it.

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Pell was heard in support of his rule, and the Court having taken time to consider, judgment was now delivered by

BEST, Ch. J. :

The only question in this case was, whether the plaintiffs were concluded by an award which had been made on the subject of the demand, to enforce which the action was brought. The plaintiffs are five in number, but the submission to the award was signed by no more than three of them, and the question is, whether a submission by the three will bind the five. The Court are of opinion that it will not bind them. It has been urged that a release by one of several partners will bind the others, and that is true, because as a debtor may lawfully pay his debt

† 2 B. & Ald. 673. [In that case p. 150.—B. C.]
there was evidence of ratification. † 2 Mod. 228.
See *Lindley on Partnership*, 6th ed.,

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F.
SALT.

to one of them, he ought also to be able to obtain a discharge upon payment. It has further been urged that the admission of one partner is binding on his fellows, this, however, is not exactly so ; such an admission is evidence against all the partners, and as such evidence, it may affect them more or less, but it does not affect this case, for even in the case of a general partnership, one of the partners cannot bind the others without an authority express or implied, and an authority can only be implied for what is necessary to carry on the trade in which the partners are concerned. Now to enter into a submission for arbitration is no part of the ordinary business of a trading firm, and there is nothing in the present case to shew that either of the parties had authority to bind the others to such a submission. It is true that in *Strangford v. Greed* the point now determined was not exactly in issue, but it was almost inseparably connected with the point which was there decided : it was laid down in that case *that partner A. may engage for the performance of an agreement by his co-partner B., and if B. fails to perform, it will be a breach of A.'s engagement ; if it is a breach of A.'s engagement, it seems to be implied that B. was not jointly bound with him, for had he been bound, it would have been a breach of the engagement of both.

[*104]

The language of Comyn's Digest is to the same effect. "If there be a controversy between A. of the one part, and B. and C. of the other, and B. submit for himself and C., and there be an award that B. shall pay, this is good, though C. be a stranger." We should be sorry to establish a principle by which those who are concerned in joint contracts should be rendered more extensively liable than at present.

Rule discharged.

THOMAS *v.* JACKSON.

(3 Bing. 104—105; S. C. 10 Moore, 425; 3 L. J. C. P. 182.)

To say (in the presence of others) of one who carries on the business of a corn vendor, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for," is actionable, and entitles him to a verdict without proof of special damage.

THE declaration stated, that the plaintiff was a husbandman, and farmer of a certain large farm of arable and other lands, with the appurtenances, and a vendor of the corn by him raised and grown in and upon his said farm and lands, and carried on the business of a husbandman and vendor of corn with great integrity, and with the good opinion of his neighbours and other good subjects; and that the defendant slandered him, by saying to him and of him, as such husbandman, farmer, and vendor of corn, in the presence and hearing of others, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for;" whereupon one Marr, who, before the speaking of the words, was about to make a purchase of the plaintiff, refused to do so. The defendant pleaded the general issue, and *justified the charge of selling oats 6d. a bushel worse than those bargained for.

At the trial before Bayley, J., last York Assizes, the plaintiff proved the speaking of the words, as alleged in the declaration, but failed in establishing the existence of the special damage.

Whereupon the learned Judge told the jury, that unless special damage was proved the action could not be maintained; and that therefore they must find a verdict for the defendant. But in order to save the parties the expence of coming to trial again, in case the Court above should dissent from his direction touching the special damage, they might also say what damage they thought the plaintiff had sustained by the speaking of the words only.

The jury found a verdict for the defendant, and said they could find no damages for the plaintiff, "because he had not substantiated the charge."

Bosanquet, Serjt. obtained a rule *nisi* to set aside this

1825.
May 14.

[104]

[*105]

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JACKSON.

verdict and enter a verdict for the plaintiff, or to allow him a new trial, on the ground that the words alleged in the declaration having been spoken of the plaintiff in his business or calling of a corn vendor, were actionable, and entitled him to a verdict without proof of special damage.

Vaughan, Serjt. shewed cause, but

The COURT were clearly of opinion, that these words spoken of a corn-factor were actionable, without proof of special damage; and BEST, Ch. J. said, that such would be the case with any words which imputed to a man fraudulent conduct in the business whereby he gained his bread.

The rule, therefore, for a new trial was made absolute, unless the defendant consented within a week to allow a verdict to be entered for the plaintiff with 40*s.* damages.

COLLEDGE *v.* HORN.†

(3 Bing. 119—123; S. C. 10 Moore, 431; 3 L. J. C. P. 184.)

1825.
May 16.

[119]

The following letter from the defendant to plaintiff's attorney, was given in evidence by a plaintiff in answer to a plea of the Statute of Limitations. "I have received yours respecting plaintiff's demand; it is not a just one; I am ready to settle the account whenever plaintiff thinks proper to meet on the business; I am not in his debt 90*l.*, nor any thing like that sum; shall be happy to settle the difference by his meeting me."

Held, that the Judge was justified in directing the jury, "that after this letter the Statute of Limitations was out of the question."

Per BURROUGH, J.: A statement made by a counsel upon his address to the jury, but in the hearing of his client, is binding on the client if he makes no objection.

THIS was an action to recover money alleged to be due from the defendant to the plaintiff. The defendant pleaded the Statute of Limitations; and as to a part of the demand, proposed

† Referred to and applied by *Turner* (1875) L. R. 10 Q. B. 500, 518; 45 L. J. Q. B. 66, 73.—R. C. *CLEASBY*, B. in his judgment in the Exchequer Chamber in *Chasemore v.*

at the trial before the Chief Baron, at the last Hertford Assizes, to prove an admission made in the presence of the plaintiff, by the plaintiff's counsel, in his opening address to the jury on a former trial; when, however, the witness, who was called to prove this admission, was asked "what was said by the counsel for the plaintiff," the learned CHIEF BARON prohibited the witness from answering, and rejected the evidence.

COLLEDGE
HORN.

In answer to the plea of the Statute of Limitations, the plaintiff gave in evidence the following letter from the defendant to the plaintiff's attorney.

"SIR,—I this day received yours respecting Mr. Thomas Colledge's demand; it is not a just one. I am ready to *settle the account whenever Mr. T. C. thinks proper to meet on the business. I am not in his debt 90*l.*, nor any thing like that sum: shall be happy to settle the difference, by his meeting me in London, or at my house.

[*120]

"Yours,

"January 10, 1820.

"GEO. HORN.

"I shall write Mr. Colledge on the subject."

The learned Judge told the jury, that after this letter the Statute of Limitations was out of the question, and a verdict was thereupon found for the plaintiff.

Vaughan, Serjt., objecting that the learned Judge ought to have left it to the jury to determine whether or not this letter was an acknowledgment of any existing demand, and particularly whether it applied to the demand on which the action was brought, instead of taking upon himself to decide, that after the letter the statute was out of the question, and objecting that evidence of the admission by the plaintiff's counsel ought not to have been rejected, obtained a rule *nisi* for a new trial.

Upon reading the Judge's notes it did not appear, nor could it be distinctly ascertained in what part of the Court the plaintiff stood at the former trial, when the alleged admission was made by his counsel, nor whether he was within hearing of what was said.

COLLEDGE

[After argument:]

r.
HORN.

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BEST, Ch. J. :

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With respect to the Statute of Limitations none of us entertain any doubt. In effect, the consideration *of the defendant's letter was left to the jury, though with a strong observation from the learned Judge, which was well warranted, because upon the face of the letter there is a clear admission of an existing cause of action. If it had been simply left to the jury to say whether or not this letter took the plaintiff's case out of the Statute of Limitations, and the jury had found for the defendant, we must have granted a new trial.

The other question is one of great difficulty, and I avoid saying any thing on it till we have all the facts fully before us ; at present it does not appear whether or not the plaintiff was within hearing of the statement made by his counsel, or how far that statement was authorised.

PARK, J. :

Even if there had been an omission to leave the defendant's letter to the consideration of the jury, yet if no possible doubt arises on the construction of it, that omission would be no ground for granting a new trial.

Upon the other question there must be a new trial to ascertain the facts ; till they are known, I abstain from coming to any conclusion on the subject.

BURROUGH, J. :

Where a letter is so clear as this, a Judge is justified in telling the jury it is an admission of a debt. Upon the other question, I see no difficulty at all ; parties are every day bound by the acts and declarations of their counsel ; if the plaintiff was in Court, heard what his counsel said, and made no objection, I think he was bound.

GASELEE, J. :

There is nothing in the question upon the Statute of

Limitations. Upon the other question I *forbear to give any opinion under the present imperfect statement.

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v.
HORN.
[*128]

The rule for a new trial was then made absolute, with an agreement to discharge it if the plaintiff would consent to accept 36l. in full of his demand.

C. P. TRINITY TERM.

HOULISTON v. SMYTH.

(3 Bing. 127—131; S. C. 10 Moore, 482; 3 L. J. C. P. 200; S. C. at Nisi Prius, 2 Car. & P. 22.)

1825.
June 7.
[127]

Where a wife leaves her husband under such an apprehension of personal violence as a jury shall esteem to have been reasonable, her husband is liable for necessities furnished for her support.

ASSUMPSIT to recover against the husband 17l. for board and lodging provided for his wife by the plaintiff, from the 18th of May to the 13th of July, 1824.

At the trial before Best, Ch. J., Middlesex sittings after Easter Term last, it appeared that the defendant having treated his wife with unusual cruelty, she had quitted him under the apprehension of further violence, and had taken refuge with the plaintiff. Among other facts, it was proved that the defendant, sanctioned by the opinion of a young medical man, had, in 1823, confined *his wife in a mad-house, although she was perfectly sane, and was afterwards released under a *habeas corpus*. She then returned to her husband, and the immediate occasion of her flight to the plaintiff's was personal violence on the part of her husband, he having struck her with his fist in the face, having threatened her with a pistol, and with another confinement in the mad-house.

[*128]

On the part of the defendant it was proposed to shew that in December, 1824, the Ecclesiastical Court had, in a suit for a divorce, decreed the defendant's wife alimony from the 8th of May preceding; and also that about two years previously to the trial she had committed adultery. The CHIEF JUSTICE, however,

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SMYTH. dismissed these two grounds of defence, as affording no answer to the action; the alimony not having been decreed till some months after the period of the plaintiff's claim, and the defendant having received his wife again after the commission of the alleged adultery; and he directed the jury that if they thought the defendant's wife had left his house with reasonable grounds for apprehending personal violence, she was entitled, wherever she went, to credit for her support.

The jury having found a verdict for the plaintiff with 17*l.* damages,

Vaughan, Serjt. moved for a rule *nisi* for a new trial, on the ground that the jury had been mis-directed; he urged that no case had gone so far as to decide that the wife was entitled to credit if she left her husband upon a mere apprehension of violence. In *Horwood v. Heffer*† MANSFIELD, Ch. J. said, "Nothing short of actual terror and violence will support this action. And
[*129] LAWRENCE, J. thought the circumstance of a prostitute *being placed at the husband's table not sufficient to justify the wife's departure, so long as she could obtain support in his house.

If mere apprehension of violence were sufficient to authorize such a course, a fantastic woman might elope without any just cause of complaint, or upon fear of that degree of chastisement which the law allowed.

Then the alimony which had been decreed to the defendant's wife had relation back to a period anterior to the plaintiff's claim; and if he could recover in this action, she would have the credit obtained against her husband, as well as her alimony.

With respect to the adultery, it might be that the husband upon receiving his wife again knew nothing of it, and in that case he would be discharged from any claim upon her subsequently quitting his roof.

BEST, Ch. J.:

There is not the least pretence for this motion; the only ground on which a new trial can be asked for is a supposed mis-direction on my part. I told the jury that if they were of

† 3 Taunt. 421.

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opinion the defendant's wife had reasonable ground to apprehend personal violence, she was justified in leaving her husband; that the man who received and supported her under such circumstances acted like a Christian, and in a Christian country was entitled to compensation. I am still of that opinion, and it is warranted even by the case of *Horwood v. Heffer*; for LAWRENCE, J. says, "You did not state any apprehension of her personal safety;" from which it may be inferred that if evidence had been adduced of such apprehension, the decision of the Court would have been the other way. But a woman is not bound to wait till actual violence is committed, and if she has reasonable ground for apprehending danger, may fly from the presence of her husband. It has been objected, that the establishment of this principle may lead fanciful women to quit their homes without sufficient *reason. The apprehension, however, is not to be merely such as a fanciful woman may entertain, but such as a jury shall esteem to have been felt upon reasonable grounds. It was put to the jury in the present case, whether *they* thought the woman had reasonable ground for apprehending personal violence. The jury were warranted in concluding she apprehended a repetition of the violence offered to her the year preceding; and more horrid treatment no female had ever experienced. If I had recollected the cases decided by Lord ELLENBOROUGH, I should have decided, even at Nisi Prius, against the case of *Horwood v. Heffer*. The doctrine in that case cannot be law. Is a decent woman to stay under the same roof with a prostitute? to sit at the same table with her? or to give place, and receive her meals in a separate apartment? The law can never require any woman to act contrary to decency: If a wife remains in the house with her husband and an adulteress, I doubt whether she could afterwards obtain a divorce for the adultery of her husband; her continuance in the house with her husband under such circumstances, might be considered as an assent to his conduct, and prejudice her case in the Spiritual Court.

[*130]

As to the act of adultery which has been imputed in this case to the defendant's wife, it can be no defence to an action arising out of transactions subsequent to her return to, and reception by

HOULISTON her husband. In order to render adultery on the part of the
 v. wife a defence for the husband in an action like the present, she
 SMYTH. ought to be repudiated at the time of the adultery, and not
 received again.

The alimony was not decreed till many months after the flight of the defendant's wife, so that she must have starved if the husband were not holden liable for her support in the mean time.

PARK, J. :

[*131] There is no ground whatever for interfering with this verdict. The direction to the jury was *perfectly correct, and the true question was, whether the conduct of the defendant was such as to occasion on the part of his wife a reasonable and strong apprehension of personal violence. From what had passed before, she had a reasonable ground for apprehending such violence, and the jury have drawn the proper conclusion. I am surprised at the language ascribed to the Court in *Horwood v. Heffer*, because it is abhorrent from every feeling of a man and a Christian. It is not to be endured that the mistress of a house should confine herself to a chamber with bare necessities, when a prostitute is sitting at the same table with her husband. That cannot be the law of England, because it is not the law of morality and religion.

BURROUGH, J. :

It is not necessary for us to consider the case of *Horwood v. Heffer*: the only question here is, whether there was evidence at the trial from which the jury might presume the wife had a reasonable ground to apprehend personal violence. I am of opinion there was enough to warrant this, and that the verdict ought not to be disturbed.

GASELEE, J. :

It is not necessary for us to enquire now what species of violence will justify a wife in leaving her husband's house, for it is impossible to doubt that the improperly confining her in a madhouse, is of itself a sufficient cause. It was for the jury to

say whether or not a reasonable ground of apprehension existed, and they having found the fact, I do not feel myself called upon to give any opinion on the case of *Horwood v. Heffer*. I have always considered the law on this subject to be as laid down by Lord KENYON, that if a man renders his house unfit for a modest woman to continue in it, she is authorised in going away.

HOULISTON
v.
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Rule refused.

SPOONER v. BREWSTER.†

(3 Bing. 136—139; S. C. 10 Moore, 494; 3 L. J. C. P. 203; S. C. at Nisi Prius, 2 Car. & P. 34.)

1825.
June 8.
—
[136]

Though the freehold of the church-yard is in the parson, trespass lies for the erector of a tombstone against a person who wrongfully removes it from the church-yard and erases the inscription.

TRESPASS for seizing, cutting, damaging, and destroying divers tombstones and gravestones of the plaintiff, and with chisels and other instruments cutting out and erasing therefrom divers inscriptions, letters, and figures of the plaintiff, and taking and carrying away the same stones, and converting them to defendant's own use.

Plea, general issue.

At the trial before Best, Ch. J. Middlesex sittings after last Easter Term, it appeared that one Gravenor had in 1815 married the daughter of the plaintiff, who having been convicted of purchasing Government stores, was then undergoing sentence of transportation in New South Wales. Mrs. Gravenor died in 1816, when the plaintiff being still abroad and under sentence, his wife erected and paid for a tombstone to her daughter in Bethnal Green church-yard, and some little time after caused to be inscribed upon the stone, the words "The family *grave of John and Sarah Spooner." In January, 1825, the defendant (by direction of Gravenor who had paid for the grave) took up the tombstone, and immediately conveyed it to his workshop.

[*137]

† Cited by WILLES, J. in *Ashby v. Harris* (1868) L. R. 3 C. P. 523, 530; 37 L. J. M. C. 164, 168. Referred to by Sir ROBERT PHILLIMORE in *Keet v. Smith* (1875) L. R. 4 A. & E. 398, 414; 44 L. J. Ecc. 70, 72.—R. C.

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While he was in the act of removing the stone he received a prohibition from the plaintiff, whose consent had been asked and refused; and after the stone had been removed from the church-yard, notice was given him by the plaintiff not to alter it; this notice he promised to observe, but subsequently said he was indemnified, and would alter it: he then obliterated the words "The family grave of John and Sarah Spooner," and added the record of the death of Gravenor's two children.

It was objected on the part of the defendant that the freehold of the church-yard being in the parson, the plaintiff could not maintain trespass for what the defendant had done.

A verdict, however, was found for the plaintiff, with leave for the defendant to move to enter a nonsuit instead.

Wilde, Serjt., who moved accordingly, cited in support of the objection urged on the trial Com. Dig. Eglise G. 1, 2 Roll. Abr. 337, *Corren's case*,† *Frances v. Ley*,‡ and Com. Dig. Action on the Case for Mifeasance, A. 6, to shew that the remedy was by case and not by trespass, even where the parson had improperly removed ornaments placed in the church in honor of persons interred there. In Godbolt, 200, where it was said trespass would lie against the parson under such circumstances, a reference was made to the Year Book, which did not warrant the position.

(BEST, Ch. J. : In *Dawtrie v. Dee*§ it was holden that the owner of a pew might maintain trespass for breaking it. But in the present case the erasure seems to have been a distinct act of trespass *after the removal of the stone.)

[*138]

That will not assist the plaintiff, for the taking up, the removal, and the erasure constituted one continued act, and the property and possession of the tombstone never reverted to the plaintiff. In the severance by a thief of things fixed to the freehold, the thing severed is not deemed a chattel so as to render the taking of it felonious, unless an interval elapse between the severance and removal.

† 12 Co. Rep. 103.

‡ Cro. Jac. 367.

§ 2 Roll. Rep. 140; Palm. 46.

The COURT took time to consider, and now

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BEST, Ch. J. said :†

There is no doubt that some action may be maintained for the injury of which the plaintiff complains. Lord Coke says, the parson in such a case “is subject to an action to the heir”;‡ but this passage does not state what form of action is to be adopted. The observance of forms is indeed material for the purposes of justice, but upon consideration we are all of opinion that the form which has been chosen in the present instance is right. There are many authorities which shew that the heir may maintain an action in cases of this kind: so also the owner of a pew for violations of the right to enjoy it. In general that right is conferred by the ordinary, and case is the remedy for a mere obstruction; but in *Dawtrie v. Dee* it is said, if the pew itself which the party has put up, be broken, trespass lies. That case has, I understand, been somewhere doubted, but I think it consistent with law and good sense, and it agrees with the decisions in 9 Edw. IV. 14, 8. In Moore, 878, *Lady Grey's* case is cited, and trespass said to be the proper form.

In a case like the present, where it is clear some action is maintainable, one instance is sufficient to decide the form. As to the cases of felony the distinctions *in favorem vite* are exceedingly nice, but even in those *cases a slight interval between severance and removal, will make the thing removed a chattel. The defendant here subsequently to the removal of the stone, was cautioned not to obliterate the inscription, and he promised to abstain from doing so; but afterwards, saying he was indemnified, effected the erasure complained of. It has been urged that the freehold of the church-yard is in the parson; that is undoubtedly true, but even he has no right to remove the tombstones, the property of which remains in the persons who erected them.

[*139]

The rest of the COURT concurring, the rule was

Refused.

† The reporter was absent when this judgment was delivered, and is indebted for it to a gentleman at the Bar.

‡ Co. Litt. 18 b.

1825.
June 20.

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TAPLIN v. ATTY.†

(3 Bing. 164—166; S. C. 10 Moore, 564; 3 L. J. C. P. 218.)

Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff while the sheriff was yet in office, and the bailiff, upon being called as a witness, did not produce it: Held, that proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents.

TROVER against the Sheriff of Warwickshire, for certain goods of the plaintiff which the sheriff had taken under an execution, issued by one Reynolds against the effects of one Stanton.

At the trial before Park, J., London sittings in Easter Term last, in order to connect the sheriff with the transaction, the bailiff who conducted the execution was called, but without any *subpœna duces tecum*, to produce the sheriff's warrant for levying; he, however, stating that he had returned the warrant to the under-sheriff, the plaintiff, in order to entitle himself to give parol evidence of its contents, proved service on the defendant's attorney of a notice to produce the warrant at the trial, the defendant having been still in office at the time the warrant was returned to the under-sheriff. The learned Judge, however, thought this was not sufficient, and that the plaintiff ought to have given such a notice to the under-sheriff or his attorney, which not having been done, the plaintiff was nonsuited.

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Vaughan, Serjt. obtained a rule *nisi* in the last Term to set aside this nonsuit and have a new trial, on the ground that, under the circumstances of the case parol evidence of the contents of the warrant ought not to have been excluded. Against this rule,

Pell, Serjt. in this Term shewed cause:

The bailiff ought to have been served with a *subpœna duces tecum*, and also the under-sheriff, before parol evidence could be received of the contents of the warrant. The constant practice is, that if a warrant be executed, the bailiff keeps it for his own justification, and merely returns to the sheriff

† *Suter v. Burrell* (1838) 2 H. & N. 867, 27 L. J. Ex. 193.

a memorandum of what has been done. In *Martin v. Bell*[†] a notice had been given to the sheriff to produce the warrant, but that was holden not sufficient to let in parol proof of its contents.

TAPIN
v.
ATTY.

Vaughan and Wilde, Serjts., in support of the rule :

The warrant was in the possession of the under-sheriff, and his possession is the possession of the sheriff. The sheriff and his officers are one: Bro. Abr. Sheriff. In *Drake v. Sykes*,[‡] LAWRENCE, J. said, the admissions of the under-sheriff would affect the sheriff; and a notice to a customer to produce a check is sufficient to let in parol evidence of its contents, although it is lodged at his banker's office: *Partridge v. Coates*.[§] So a notice to a ship-owner to produce papers, although the captain has possession of them for his own protection.||

Cur. adv. vult.

BEST, Ch. J. :

This was an action of trover against the Sheriffs of Warwickshire, for taking, under an execution *against one Stanton, goods which the plaintiff alleged to be his property. In order to connect the sheriff with the transaction it was necessary to prove his warrant to the bailiff who levied the execution. The bailiff was subpœnaed, but not under a *subpœna duces tecum*; had he been called under a *subpœna duces tecum* he would probably have procured the warrant, but his account was, that he had returned it to the under-sheriff. There has been some difficulty as to the time at which the warrant was so returned, but my brother PARK thinks it was during the time when the sheriff remained in office; no notice was given to the under-sheriff to produce the warrant, and if it had been placed in his hand after the sheriff had gone out of office, our judgment might have been different, for it would be inconvenient, when the sheriff is no longer in office, to compel him to send perhaps across the whole county to apprise his under-sheriff of such a notice: but as he was still in office, and as his under-sheriff is in law identified

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† 1 Stark. 413: reported on another point, 18 R. R. 354.

‡ 7 T. R. 113, 117.

§ Ryan & Moody, 153.

|| *Baldney v. Ritchie*, 1 Stark. 338.

TAPLIN
v.
ATTY.

with him, we think notice to the sheriff is equivalent to notice to the under-sheriff. When, therefore, the notice was served upon the sheriff's attorney, he ought to have sent to the under-sheriff for the warrant. The case of *Martin v. Bell* is distinguishable, inasmuch as the paper was not traced to the hand of the under-sheriff. The rule, therefore, for a new trial, which has been obtained in this case, must be made

Absolute.

1825.
June 20.

[167]

BRAZIER v. BRYANT.

(3 Bing. 167 ; S. C. 10 Moore, 587.)

Corruption in the arbitrator is no answer to a motion for an attachment for non-performance of an award.

ON SLOW, Serjt. shewed cause against a rule for an attachment against the defendant for not performing an award made under a rule of Court, and he proposed to prove by affidavit corruption in the arbitrator ; but

The Court said, that such an objection was not any answer to a motion for an attachment, although it might have formed the ground of a specific motion for setting aside the award ; for this they referred to *Holland v. Brooks*† and *Braddick v. Thompson*,‡ and observing that the rule in *Holland v. Brooks* was founded on good sense, they made the rule

Absolute.

† 3 R. R. 142 (6 T. R. 161).

‡ 15 R. R. 751 (8 East, 344).

C. P. MICHAELMAS TERM.

CHOLMELEY *v.* PAXTON.

(3 Bing. 207—215; S. C. 11 Moore, 17; 4 L. J. C. P. 41.)

A trustee having a power to sell an estate of which the beneficiary was tenant for life without impeachment of waste, sold and conveyed the land only, received the money for it, and applied it to the purposes of the trust; the beneficiary, by the same conveyance, sold and conveyed the timber, and received the money for it:

Held, that the power was not well executed.

1825.
Nov. 12.

[207]

THIS was a writ of formedon. The pleadings, which were of enormous length, may be stated in substance as follows: The demandant in his count set out so much of the will of Sir Henry Englefield as shewed that an estate was devised by him to Lord Cadogan and Sir Charles Buck, in trust for the eldest son of Sir H. Englefield for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of his eldest son in tail male; remainder to his second son for life without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of his *second son, in succession, in tail male; remainder to the demandant's mother for life, without impeachment of waste; remainder to trustees to preserve contingent remainders; remainder to her first and other sons in succession, in tail male. The count then shewed the death of the testator and his wife (for whose benefit a term was created, which by her death was determined), the death of the testator's two sons without issue, the death of the demandant's mother, and that the demandant was her eldest son, in which right he claimed the estate.

[*208]

The tenants in their eighth plea, on which the question chiefly turned, stated that the trustees and the survivors of them were empowered by the will at the request of any person in possession as tenant for life to sell the estate for such price as they should think reasonable, and for the purpose of such sale to revoke the uses expressed in the will, and to declare other uses, and to lay out the proceeds in the purchase of other lands which they were

CHOLMELEY to hold to the same uses as the land devised, and to receive and
v.
PAXTON. give a discharge for the purchase money which they were to lay out in real or Government securities, until a proper estate could be purchased, and in the mean time to pay the interest and dividends to the tenant for life.

The plea then stated, that in pursuance of this power Lord Cadogan, after the decease of Sir C. Buck, at the request of Sir H. C. Englefield, the first tenant for life, sold the estate to Byam Martin for 13,400*l.*, which Lord Cadogan judged to be a reasonable price for the same, and then set out so much of the deed to Byam Martin as revoked the former uses of the will, and conveyed the estate to a person in trust for Byam Martin in fee, for the price of 13,400*l.*

[*209] The plea next deduced the title from Byam Martin and his trustee to the tenant. Profert was made of the *deed of conveyance from Lord Cadogan to Byam Martin. In the replication, oyer was demanded of that deed. The deed was then set out, from which it appeared that Lord Cadogan sold the estate, exclusive of the timber growing upon it, for 13,400*l.*, and that such timber was sold by Sir H. C. Englefield to Byam Martin for 2,448*l.*, which timber Sir H. C. Englefield by the same deed conveyed to Byam Martin and his heirs, and the receipt of which 2,448*l.* Sir H. C. Englefield acknowledged in the body of the deed, and also by a receipt on the back of it.

The replication also stated the will of Sir H. C. Englefield, and shewed from that will that the power was what it was stated to be in the eighth plea, and brought under the view of the Court the supposed imperfections in the execution of the power by the trustees selling only the land and allowing the tenant for life to sell the timber on it, and to receive the price thereof. To this replication there was a general demurrer and joinder.

The case was argued in Trinity Term.

Peake, Serjt. in support of the demurrer :

The power was well executed. The tenant for life having an estate without impeachment of waste, had a right to sell all the timber, and convert it to his own purposes. The estate itself could not be sold without his consent, and he was entitled to

receive the produce of the timber. In *Lady Plymouth v. Lady Archer*,† *Burges v. Lamb*,‡ and *Wolf v. Hill*,§ Lord ELDON held that the tenant for life was entitled to sell the timber upon an estate purchased in lieu of one in which he had been tenant for life without impeachment of waste. If, therefore, he might cut, either upon the first property, *or that which was received instead, it is difficult to say why he might not sell.

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But, at all events, the conveyance by Lord Cadogan operated as a revocation of the uses of the will, and thereby destroyed the plaintiff's claim.

Cross, Serjt. contrà :

The tenant for life was not the owner of the timber, but had only the liberty to cut, without being subject to an action: *Lewis Bowles's case*;¶ and the trustee having conveyed the soil only, without the timber, has not executed the power; for under that power he was not only to exercise a judgment as to the price to be paid for the property, but to purchase another in exchange, and this would be less valuable than the property sold, by the amount of the price of the timber. It might happen that the timber might be worth more than the rest of the property. Even with regard to the right of cutting down, it is by no means clear that a tenant for life, without impeachment of waste, can do more than cut in a husbandman-like manner: *Bridges v. Stephens*.¶

Cur. adv. vult.

BEST, Ch. J., after stating the pleadings (as in the beginning of the case) now delivered the following judgment :

From the deed set out in the replication it appears that Lord Cadogan had nothing to do with the sale of the timber, and that he formed no opinion as to the reasonableness of the price paid for it, nor ever received or had any control over it: although it is conveyed as real property to the heirs of the purchaser, the trustee does not join in that conveyance; he does not convey the woods, but only the land on which the woods stand.

† 1 Br. Ch. Rep. 159.

‡ 10 R. R. 150 (16 Ves. 174).

§ 2 Swanst. 149, n.

|| 11 Co. Rep. 79.

¶ 2 Swanst. 150, n.

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This is at least the effect of the deed, for although a conveyance of the land would convey the timber, if there were nothing to control the effect of such conveyance, here it is controlled by the conveyance of the wood in the same deed.

It seems to have been supposed that as Sir H. C. Englefield was not impeachable of waste, the woods whilst standing and forming part of the estate were his property, and he is by the deed the only party who conveys the woods.

The question, therefore, is, whether Lord Cadogan having sold and conveyed the estate, without the timber standing on it, has executed the power so as to convey the estate or any part of it, or any interest in it.

A tenant who is not impeachable for waste, may cut down all the timber on the estate, and the moment it is severed from the ground he may convert it to his own use. But a tenant without impeachment of waste, has no interest in the woods while standing, nor can he convey any interest in them to another. A tenant in tail is unimpeachable of waste; but if standing woods are sold by him, and these are not cut down during his life, the property in them descends with the estate, and the vendee cannot cut them. The tenant in tail, or other tenant unimpeachable of waste, may give authority to cut down timber, but such authority conveys no interest, and is revoked by the death of the person by whom it is given.

It may be said that if a tenant unimpeachable of waste might cut every tree on the estate, as the estate will sell better with the trees uncut than when quite denuded of timber, is it not for the advantage of the reversioner that the tenant for life should give up his right of cutting the timber, and be permitted to sell it with the estate? Whether this would be for the advantage of the reversioner must depend upon many circumstances, *such as the quantity of timber and the means which the tenant for life may have of cutting it. He may die before he can cut the whole or a considerable part, or even a single tree. Although a tenant in tail may bar remainders by a recovery, yet the Court of Chancery will not allow a trustee who has lands in trust for one and the heirs of his body, with remainder over, to convey to such person in fee, because such a conveyance would prevent

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the reversioner from claiming the estate if the tenant in tail should die before he could suffer a recovery.† It is not fit, therefore, that a tenant for life or trustees should be permitted to do what may prejudice the reversioner without his concurrence; besides, in the sale of growing timber, trees of the value of a shilling are included, and although a tenant unimpeachable of waste would not be liable to any action for cutting such small trees, a court of equity would prevent him from taking such as were not ripe for cutting.

The tenant unimpeachable of waste by selling the timber standing, gets an advantage over the reversioner which he otherwise could not be permitted to obtain.‡ It does not appear that any of this timber was felled during the life of Sir H. C. Englefield. It was a part of the estate at the time of the sale, and may be a part of the estate at this moment. This part of the estate has not been conveyed by the trustees, or by any other person that had authority to convey it: is then the sale of an undivided part of the estate (for the trees whilst standing are a part), a good execution of the power as to the part sold? The power of sale in the will, is in these words: "To make sale and dispose, or to convey in exchange of or for any other manors, all or any part or parts of the messuages aforesaid, with the appurtenances either together or in parcels, for such price or prices in *money or any other equivalent as to them the trustees should seem reasonable." The trustees must substantially comply with the authority given to them; if they do not, the act done by them will not be a good execution of the power, and the conveyance will be altogether void. They might sell different parcels of the estate at different times, and make separate conveyances of each parcel so sold; that is the extent of their authority. They cannot sell part of a parcel. They must not sell the land without the timber, or the timber without the land on which it grows. The sale of the one without the other would be a cause of confusion and litigation, which could not fail to be injurious to both the vendor and vendee, and such a sale is a material departure from the power, injurious to the reversioner, and therefore altogether void.

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† 1 Eq. Ca. Abr. 395.

‡ 2 Bro. P. C. 88.

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When a tenant for life requires an estate to be sold under such a power as this, he places himself in the situation of the owner of an estate decreed to be sold by the Court of Chancery, and he must, like him, sell it with the timber : *Burges v. Lamb*.† As the estate to be purchased with the proceeds of the sale must be conveyed to the same uses as the old estate, the tenant for life will have a right to cut down the timber on the purchased estate, and that is a just equivalent for his not cutting the timber on the first estate. It was not attempted at the Bar to prove that although the timber was not conveyed, the conveyance of the land on which such timber was standing, might be supported. We presume that such an argument was considered untenable. My brother *Peake* seemed to feel that the sale was not warranted by the power, and he argued, that although the sale might not be good, yet the trustees having a power to revoke the uses in the will, and the *surviving trustee having revoked the uses, the demandant had no title to support his formedon. But they are only to revoke the uses for the purpose of a sale or exchange; that is, for purpose of such a sale or exchange as is consistent with the legal power. The legal estate is in the cestui que use, and nothing remained in the trustees but a conditional power. The will authorizes the trustees to sell on the request of the tenant for life in possession, and then it says, "and to that end, (that is, that they make a sale), they may revoke and make void the uses on which this estate is devised to them." If they had revoked the uses by one deed, and conveyed the estate by another, the two deeds would be considered as parts of the same transaction, and if the conveyance had been void, the revocation of uses preparatory to the conveyance would have been void also. Although the case of *Doe d. Willis v. Martin*,‡ is in many of its circumstances distinguishable from the present, all the Judges who decided that case, lay down a principle which governs this. Lord KENYON says, "I am most clearly of opinion, taking the whole of the power together, that the deed was no legal revocation: they had only a power to revoke on condition." ASHHURST, J. says, "Their interests (the interests of the cestui que use) could only be divested by a due execution of the power of revocation :

† 10 R. R. 150 (16 Ves. 174).

‡ 2 R. R. 324 (4 T. R. 39).

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a bad execution has no operation whatever." BULLER, J.: "The power of revocation was conditional only, but that condition not having been complied with, the deed of revocation is void."

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GROSE, J.: "This was merely a conditional power which must be considered altogether, and no part of the execution can be good unless the whole be so." It is true, that in *Doe d. Willis v. Martin*, the trustee who made the conveyance was an infant, and it was thought the case was not within the *7 Ann. c. 19, which gives validity in certain cases to the conveyances of infant trustees. But this was not the reason given by any one Judge for his judgment: they all rest their judgment on this, that although the revocation of the uses and subsequent conveyance of the property were by different instruments, yet all the acts done were in execution of the power, and that not being well executed, every deed made for the purpose of executing that power was void. In the present case the revocation of the uses and the conveyance of the estate are done at the same time and by the same deed. The remainder, which under the will vested in the demandant, could only be divested by a legal revocation of uses by the trustees, and as there was no good revocation of the uses, the demandant's estate remained undisturbed, and the trustee had no legal interest to convey.

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We are therefore of opinion, that the eighth plea is not supported by the deed which is set out on oyer, and that the demandant is entitled to our judgment on the demurrer to the replication to that plea.

Judgment for demandant.

MAVOR, ASSIGNEE OF W. H. PYNE v. PYNE.

(3 Bing. 285—289; S. C. 11 Moore, 2; 4 L. J. C. P. 36; S. C. at Nisi Prius, 2 Car. & P. 91.)

1825.
Nov. 9.

[285]

Upon a contract for twenty-four numbers of a periodical work, to be delivered monthly, at a guinea a number, a plaintiff may sue for the numbers actually delivered, although the contract be not reduced into writing, as required by the Statute of Frauds.

THIS was an action by the assignees of a bankrupt, for goods sold by him to the defendant. * * At the trial before Best, Ch. J.

MAVOR
F.
PYNE

Guildhall sittings after Trinity Term, it appeared that the bankrupt was author of a work called "The History of the Royal Residences," which he published by subscription, in twenty-four numbers, at one guinea a number. The numbers were printed, and left at the publisher's house ready for delivery monthly. Each subscriber received his numbers at the house of the bankrupt. The whole twenty-four numbers were completed. The defendant only took away eight numbers, although he was informed that the remainder were ready for him. * * *

[286] The jury having found a verdict for the plaintiff, * * *

Vaughan, Serjt. moved for a nonsuit on several grounds [namely, *inter alia* and thirdly] that the assignees could not sue the defendant till the bankrupt's part of the contract was performed by the delivery of the whole twenty-four numbers; and, lastly, that the contract not having been reduced to writing was void by the Statute of Frauds, as the work was not to be completed within a year: *Boydell v. Drummond*.†

Best, Ch. J. :

[287] * * The third objection was, that this action could not be maintained, the bankrupt not having performed his part of the contract. The short answer to this objection is, that the defendant put an end to the contract, consequently the plaintiff was entitled to recover for the amount of what he had performed.

[288] If a man agrees to deliver me one hundred quarters of corn, and after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received. The bankrupt was the author of a work called "The History of Royal Residences," which he published by subscription in twenty-four numbers, at the price of one guinea each number. The numbers were printed and left at the publisher's house ready for delivery monthly. Each subscriber received his numbers at the house of the bankrupt. The whole twenty-four numbers were completed.

The defendant only took away eight numbers, although he was informed that the remaining numbers were ready for him.

† 10 R. R. 450 (11 East, 142).

The defendant broke his bargain in not taking the other numbers, and was liable to pay for those he had, and the verdict is only for the eight that were received by him.

MAJOR
r.
PYNE.

The case of *Boydell v. Drummond*, which has been referred to by the defendant's counsel, shews that the Statute of Frauds will prevent plaintiffs from recovering on the original contract, where it was not in writing, and not to be performed within a year. But neither the statute nor the case shew that plaintiffs are not to be paid for numbers actually received by the defendant. In *Boydell v. Drummond*, the defendant had paid for all the numbers of the work subscribed for that he had received; and the question was, whether the executory part of the contract was binding, and the defendant bound to take and pay for the residue of the work. The reasoning of the Judges in that case is against the argument of the defendant's counsel. They consider a subscription of this sort as a divisible contract.

The meaning of the contracting parties, when they say twenty-four numbers, at one guinea each number, is, that the publisher shall be paid as the numbers come *out, not that he is to wait until the work is complete before he receives any money.

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One of the reasons for publishing in numbers is, that the publishers have not sufficient capital to complete an expensive work. Many of the most beautiful works which the public now possess, could never have been brought out unless the publishers had been paid as the numbers were delivered.

If the defendant had not put an end to the contract, I should have no difficulty in saying, that the bankrupt was entitled to be paid one guinea by him for every number that he received.

The rest of the Court concurring, the rule was

Refused.

1825.
Nor. 19.
 [292]

MUNN v. GODBOLD.†

(3 Bing. 292—296; S. C. 11 Moore, 49; 4 L. J. C. P. 54; S. C. at Nisi Prius, 2 Car. & P. 97.)

The plaintiff had lost his part of an agreement under seal after it had been duly stamped.

At the trial of an action on the agreement, the defendant, upon notice, produced his part unstamped, and the plaintiff the draft of the agreement.

Held, that the defendant's part, although unstamped, might be received in evidence.

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COVENANT on an agreement under seal, by which, in consideration of the plaintiff having for that purpose paid the defendant 300*l.*, the defendant agreed to consign to the plaintiff 600*l.* worth of Godbold's Vegetable Balsam. Plaintiff was to be the agent, and the *defendant was to take back, at the price paid for the same, all that the plaintiff should be unable to dispose of in six months. Averment that the plaintiff in that time was able to dispose of no more than would produce 13*l.* 6*s.* 8*d.* Breach that the defendant refused to take back the residue, pursuant to his agreement. The plaintiff excused himself from *profert*, by an allegation that the deed was lost. At the trial before Best, Ch. J., London sittings after Trinity Term last, the plaintiff, after having given the defendant notice to produce the counterpart, and having proved the loss of the deed declared on, which had been executed by the defendant only, offered in evidence the draft of the deed; the defendant's counsel at the same time produced the counterpart, executed by the plaintiff only, and unstamped, and insisted that the draft could not be received, because the counterpart was in Court; and that the counterpart could not be received, because it was unstamped. The objection, however, having been overruled, and the unstamped counterpart holden to be admissible evidence of the lost deed, the jury found their verdict for the plaintiff.

Bosanquet, Serjt., having on the above objections obtained a rule *nisi* for a new trial,

Wilde, Serjt., now shewed cause :

The plaintiff was entitled to produce in evidence either the

† Cp. now the Stamp Act, 1891, principle of this decision.—F. P. s. 72, which does not affect the

draft or the counterpart of the lost deed, because if both were rejected the defendant would obtain an advantage by his own wrong in omitting to stamp the counterpart. The counterpart, if read, must be read as a copy, and not as a deed, because if it were read as a deed the plaintiff must have been nonsuited, inasmuch as he had declared on a deed executed by the defendant, and the counterpart was executed only by the plaintiff. As a copy, it required no stamp.

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Bosanquet :

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When a deed is lost, the next best evidence must be produced ; and the counterpart is the next best : *Rex v. Castleton*,† *Villiers v. Villiers*,‡ Bull. N. P. 254. But if the counterpart be produced, it must be produced as a deed, not as a copy ; it being to all intents an original. If it be produced as a deed, it ought to have a separate stamp under the provisions of 55 Geo. III. c. 184, if on no other ground, at all events, because the two instruments contain together more than 2,160 words.

BEST, Ch. J. :

On the trial the plaintiff proved that there were two parts of the deed on which the action was brought, one of which, executed by the plaintiff, was delivered to the defendant, and the other, executed by the defendant, was delivered to the plaintiff. The loss of the latter was then shewn, and the plaintiff's counsel offered a copy in evidence. Upon this the counsel for the defendant produced the part executed by the plaintiff, which was not stamped, and insisted that this part could not be read for want of a stamp, but that as it was in existence, and the best evidence of the contents of the lost deed, I could not receive any copy in evidence. I thought this part was the best evidence of the contents of the lost deed, but that it was admissible without a stamp ; and it was accordingly read.

When there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy. It is prepared with more care than any other copy ; and the party

† 6 T. R. 236.

‡ 2 Atk. 71.

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[295]

who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy. The Courts have, therefore, always required, that if one part of a deed be lost and another part be in existence, it must be produced, or shewn to be in the hands of the opposite *party, and then on his refusing to produce on notice a copy may be received. In Buller's *Nisi Prius*, 254, it is said, "If it come out in evidence, that there are two parts executed, and the loss of one only is proved, perhaps a copy could not be admitted." In *Villiers v. Villiers*, Lord HARDWICKE says, "If an original deed is lost the counterpart may be read; and if there is no counterpart forthcoming, then a copy may be admitted." In *The King v. Castleton* it was held, that a person who had one of the parts of an indenture of apprenticeship ought to have been called to produce such part, and that no other evidence of the indenture could be received.

These cases prove that the part of the indenture in the hands of the defendant was the proper proof of the contents of the part that was lost.

Then comes the question, could this part be received without a stamp? I think it required no stamp. It was not produced as a deed, but merely as secondary evidence of the contents of another instrument which was lost.

It could not be read as a deed by the plaintiff, because it was not executed by the defendant, it was only used as an authenticated *copy* of the deed, which the defendant had executed. Copies need not be stamped, and, therefore, this, which could only be read as a copy, required no stamp. In *Waller v. Horsfall*,† the defendant being in possession of a stamped agreement the plaintiff proved a notice to produce, and then offered an unstamped part, which had been executed by both parties. Lord ELLENBOROUGH said, "It may be received as a copy, although, if properly stamped, it might have been used as an original." In *Garnons v. Swift*‡ the Court held, that if the party who had the stamped part of an agreement did not produce it on notice, he who had the unstamped part might give secondary evidence.

† 1 Camp. 501.

‡ 1 Taunt. 507.

I am, therefore, of opinion, that this paper was properly received, and that there ought not to be a new trial.

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Rule refused.

CROFTS v. WATERHOUSE.†

(3 Bing. 319—322; S. C. 11 Moore, 133; 4 L. J. C. P. 75.)

1825.
Nov. 26.
[319]

The driver of a stage-coach drove over a bank, and upset the coach. He had passed the spot where the accident happened 12 hours before, but in the interval, a landmark had been removed. In an action for an injury sustained by this accident, the Judge told the jury, that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict.

A verdict having been returned accordingly, the Court granted a new trial, on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence.

THIS was an action against a coach proprietor for having, by the negligence and improper conduct of his servants, overturned and injured the plaintiff in travelling by the defendant's coach. At the trial before Littledale, J., Dorset Summer Assizes, 1825, the plaintiff's witnesses proved, that the defendant's coachman, in turning a corner on the right-hand side of the road, had driven so near to the side as to gather a bank, by which the coach was overset; that, though this was between two and three in the morning, there was a full moon, and light enough to distinguish objects of all kinds; that the road was twenty-four feet wide, and, at the time, clear of all obstructions, so that there was nothing to prevent the coachman from keeping to the middle or even the left side of the road. The defence set up was, that between the time of the disaster, and the time when the coachman had last passed the spot where it happened, (about twelve hours before,) the first of two cottages which stood close to the corner in question, had been pulled down and the rubbish left by the side of the road; that the coachman mistaking the second cottage for the first, and wishing to save his horses by going as

† Cited and followed in the judgment of the Exchequer Chamber in *Readhead v. Midland Ry. Co.* (1868) L. R. 4 Q. B. 379, 388; 38 L. J. Q. B.

169, 174: compare *Francis v. Cockrell* (1870) L. R. 5 Q. B. 501; 39 L. J. Q. B. 113, 291.—R. C.

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close to the corner as possible drove out of the road over the rubbish of the demolished cottage.

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The learned Judge who tried the cause told the jury, that as there was no obstruction on the road, the coachman *ought to have kept within the limits of it; and that the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict. A verdict having accordingly been found with 150*l.* damages,

Wilde, Serjt. moved for a new trial on the ground of a misdirection, contending that it ought to have been left to the jury to ascertain whether the deviation had been occasioned by negligence or by unavoidable accident, because if it happened by unavoidable accident the defendant was not responsible; a carrier of passengers, not being, like a carrier of goods, an insurer against all hazards except the act of God or the King's enemies; nor a coachman, bound to keep to the left side of the road when no other carriage is passing; for which he cited *Aston v. Heaven*[†] and *Christie v. Griggs*;‡ and he likened the case to that of a master of a ship who should fall into peril by reason of a sea-mark having been removed or varied.

A rule *nisi* having been granted,

Onslow and *Taddy*, Serjts., who shewed cause, insisted that deviation from the limits of the road, on a moonlight night, was of itself an inexcusable act of negligence; and the deviation having been noticed in the charge to the jury, the question of negligence was sufficiently before them.

BEST, Ch. J.:

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The coachman was bound to keep in the road if he could; and the jury might, from his having gone out of the road, have presumed negligence, and on that presumption have found a verdict for the plaintiff. But the learned Judge, instead of leaving it to the jury to find whether there was any negligence, told them that *the coachman having gone out of the road, the plaintiff was entitled to a verdict.

+ 5 R. R. 750 (2 Esp. 533).

‡ 11 R. R. 666 (2 Camp. 79).

This action cannot be maintained unless negligence be proved; and whether it be proved or not is for the determination of the jury, to whom in this case it was not submitted. The coachman must have competent skill, and must use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses; a coach and harness of sufficient strength, and properly made; and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens. But with all these things, and when everything has been done that human prudence can suggest for the security of the passengers, an accident may happen. The lights may, in a dark night, be obscured by fog; the horses frightened, or, as it happened in the present case, the coachman may be deceived by a sudden alteration in objects near the road, by which he had used to be directed on former journeys.

It is not his fault, if having exerted proper skill and care, he from accident gets off the road; and the proprietors are not answerable for what happens from his doing so. I think this case must be again submitted to a jury.

PARK, J. :

The distinction between carriers of goods and carriers of passengers was not sufficiently left to the jury. A carrier of goods is liable in all events except the act of God or the King's enemies; a carrier of passengers is only liable for negligence. It is not clear that negligence can be laid to the defendant's charge in the present case, for his coachman had no means of *knowing that the cottage, his accustomed land-mark, had been removed.

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[*322]

The rest of the Court concurring, the rule was made absolute.

Rule absolute.

1825.
Nov. 26.

[322]

HOMER v. ASHFORD AND AINSWORTH.†

(3 Bing. 322—329; S. C. 11 Moore, 91; 4 L. J. C. P. 62.)

Declaration, that the defendant, for the considerations mentioned in the deed declared on, (which the plaintiff brought into Court), covenanted to submit to certain particular restraints in the carrying on of his trade, which covenant he afterwards broke :

Held, on general demurrer, that this was a sufficient statement of consideration for the restraint agreed to.

COVENANT. The plaintiff declared,—for that whereas before the making of the indenture thereafter mentioned, the defendant, Joseph Ashford, had hired himself to the plaintiff for a certain term, determinable in a manner then agreed upon by them the plaintiff and Joseph Ashford, in the capacities of clerk, book-keeper, and traveller, in the trade of a saddler's ironmonger, then carried on by the plaintiff; and Joseph Ashford had agreed with the plaintiff not to work for or be employed by any other person during the said term, without the licence and consent of the plaintiff in writing under his hand for that purpose, first had and obtained; and whereas Joseph Ashford afterwards, and whilst the said term was still undetermined, was desirous of entering into partnership in the same trade of a saddler's ironmonger with the defendant, James Marsh Ainsworth, but was prevented therefrom by reason of the said term being still undetermined; and thereupon afterwards by a certain indenture made between the plaintiff of the one part, and the defendants of the other part, (one part of which indenture, sealed with the seals of the defendants, the plaintiff brought into Court,) reciting (among other things) that in pursuance of a proposal *to that effect made by the defendants, and assented to by the plaintiff, the defendants, for the considerations therein mentioned, did thereby for themselves, jointly and severally, and for their joint and several heirs, executors, and administrators, covenant and agree with the plaintiff, his executors, administrators, and assigns, that the said defendants or either of them, their or either of their traveller or travellers, or any other person or persons, on their or either of their behalf, should not nor would, on any account or pretence

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† Cited by STIRLING, J. in judgment in *Vernon v. Hallam* (1886) 34 Ch. D. 748, 751; 56 L. J. Ch. 115, 117.—R. C.

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whatsoever, enter into or pass through to solicit or take orders, the towns mentioned in the schedule B. thereunder written, or any of them, in taking their first north and west journey, within forty-two days of the several days set opposite the said towns respectively in schedule B. at which the plaintiff presumed that he by himself or his traveller or travellers should enter, or should leave the said towns in the said schedule respectively mentioned; and also, that the defendants or either of them, their or either of their traveller or travellers, or any person or persons on their or either of their behalf, should not nor would during the term of fourteen years from the day of the date of the deed, on any account or pretence whatsoever, enter into or pass through to solicit or take orders, the towns mentioned in the schedules A. and B. after their said first north and west journey as aforesaid, nor the towns mentioned in schedule C. thereunder written, within fifty-six days of the several days set opposite the towns respectively in the said several schedules mentioned, at which the plaintiff presumed that he by himself or his traveller or travellers should enter or should leave the said towns respectively, without the licence or consent in writing of the plaintiff, his executors or administrators for that purpose first had and obtained; and *that in case the said defendants or either of them, their or either of their traveller or travellers, or other person or persons on their or either of their behalf, should and did enter into and pass through to solicit or take orders the said towns mentioned in the said schedule B., or any of them respectively, in taking their said first north and west journey, within forty-two days; and the towns mentioned in schedules A. and B., after their first north and west journeys as aforesaid, and the towns in schedule C. within fifty-six days of the several days set opposite the said towns respectively, in the said several schedules, during the term of fourteen years from the day of the date of the deed, without the licence and consent in writing of the plaintiff, his executors or administrators, for that purpose first had and obtained; then that the defendants or one of them, their or one of their executors or administrators should and would immediately after entering the said towns in the said several schedules mentioned, or any or either of them, within the times aforesaid,

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well and truly pay or cause to be paid unto the plaintiff, his executors, administrators, or assigns, the full and just sum of 50*l.* of lawful money of Great Britain, as and in the nature of stipulated damages for every order which they or he, or their or either of their traveller or travellers, or other person or persons on their or either of their behalf, should solicit or take for the sale of any goods, wares, or merchandizes in any and every of the said towns which they or he, or such traveller or travellers, or other person or persons, should so enter.

Breach, that the defendants entered Cheltenham, Exeter, and Oxford, and other towns mentioned in the schedules, and solicited and obtained orders within the days and term prohibited.

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Plea, that the performance and observance by the *defendants of their covenant in the said indenture and declaration mentioned, and of which covenant, the plaintiff had assigned the breaches, would entirely and wholly hinder, restrain, and prevent the defendants for a long space of time, to wit, for the space of fourteen years, from carrying on, using, and exercising their aforesaid trade and business of saddlers' ironmongers in any or either of the said towns of Cheltenham, Exeter, and Oxford; and, therefore, the covenant in the said indenture mentioned and so declared upon as aforesaid, was and is in restraint of trade; and, therefore, the said covenant was and is void.

Demurrer and joinder.

Taddy, Serjt. was to have supported the demurrer, but the COURT called on

Adams, Serjt. for the defendants :

He abandoned the plea, and argued that the declaration was bad, as not shewing any consideration for the restraint imposed on the defendants. *Primâ facie*, every restraint on trade is illegal: a general restraint is wholly void; and in order to sustain a restraint for a particular place or time, there must be a consideration, of the adequacy of which the Court must be enabled to judge: *Mitchell v. Reynolds*;† Serjt. Williams' note to

† 1 P. Wms. 181.

Hunlocke v. Blacklow;† *Chesman v. Nainby*;‡ *Davis v. Mason*;§ *Gale v. Reed*;|| and though deeds in general are presumed to be made on sufficient consideration, yet this presumption cannot be raised in favour of a deed which is on the face of it illegal, and which can only be shewn to be legal by the allegation and proof of an adequate consideration. But as the declaration in the present case does not shew what was the consideration *for the defendants submitting to the restraint imposed on them, the Court has no means of determining its adequacy, and the deed cannot be supported.

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Taddy, contrà :

It appears on the declaration that there *was* a consideration, for it is stated that the defendants agreed for the considerations contained in the deed; if those considerations had been inadequate, their inadequacy ought to have been pleaded. The law requires that there shall be a consideration for every restraint of trade, but not that the consideration shall always be set out on record. The adequacy of the consideration is a matter of fact which may be made the subject of proof, but the Court is not bound to go into it without such proof, unless its insufficiency appear on record.

Cur. adv. vult.

BEST, Ch. J. :

The first object of the law is to promote the public interest; the second to preserve the rights of individuals.

The law will not permit any one to restrain a person from doing what the public welfare and his own interest requires that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void because no good reason can be imagined for any person's imposing such a restraint on himself.¶ But it may often

† 2 Wms. Saund. 156.

‡ 2 Str. 739.

§ 2 R. R. 562 (5 T. R. 118).

|| 9 R. R. 376 (8 East, 80).

¶ Cited by Lord MACNAGHTEN in *Nordenfelt v. Maxim Nordenfelt Guns, &c., Co.*; '94 A. C. 535; 63 L. J. Ch. 908, 923.—R. C.

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happen, (and the present case is a strong instance of it,) that individual interest, and general convenience, render engagements not to carry on trade or to act in a profession in a particular place, proper. Manufactures or dealings cannot be carried on to any great extent without the assistance of agents and servants. These must soon acquire a *knowledge of the manufactures or dealings of their employers. A merchant or manufacturer would soon find a rival in every one of his servants, if he could not prevent them from using to his prejudice the knowledge acquired in his employ. Engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it. The effect of such contracts is to encourage rather than cramp the employment of capital in trade, and the promotion of industry. For partial restraints, however, there must be some consideration, otherwise they are impolitic and oppressive.

What amounts to an adequate consideration is to be decided by the courts of justice. We have none of us had any difficulty in saying, that the consideration stated in this record is abundantly sufficient to support the deed on which the action is brought.

The counsel for the defendants admits that the plea is bad, and insists that the declaration does not state a sufficient consideration. If he had specially demurred, his objections would have been worthy of consideration; but although the declaration may be loosely drawn, we think we can see upon it enough to support the action. It appears from it, that Ashford had engaged himself as the clerk, book-keeper, and traveller of the plaintiff for a term that was not expired, and that during this term of service Ashford was not to be employed for any one without the plaintiff's consent in writing: that Ashford was desirous of entering into partnership with Ainsworth for the purpose of carrying on the same trade as the plaintiff was engaged in, but was prevented from forming such partnership by his engagement with the plaintiff: the declaration does not state in terms that Ainsworth was desirous that Ashford should be released from his engagement with the plaintiff: Ainsworth, however, is a party to the deed by which Ashford

was released from his engagement to the plaintiff, and was *enabled to employ the knowledge of business, and his influence with the plaintiff's customers for the benefit of the firm of which Ainsworth was to be a member. It seems to us, that it was a reasonable condition of releasing Ashford from his engagements, and thereby enabling both defendants to form their partnership, that they should not be permitted to seek for orders in the towns which Ashford had travelled as the rider of the plaintiff, until after the plaintiff had been enabled to visit his old customers, who resided in these towns, for the space of fourteen years from the date of that deed. We know the influence that a rider has over the customers of his employer, and with how much effect he may use the argument — encourage young beginners. This influence is gained by the liberality of his employer, and ought not to be used against him. But it has been argued, that all deeds in restraint of trade are bad, unless a sufficient consideration for such restraint appears on such deeds. I think, that if a sufficient consideration is admitted by the pleadings, the deed may be supported, although the deed itself does not express a sufficient consideration. None of the cases on deeds restraining trade have decided that the consideration must appear on the deeds. There are other cases which prove that considerations out of the deeds may be shewn by the pleadings. These cases are referred to in the great case on the subject before us, in *Peere Williams*; 1 Vent. 108; Dyer, 146. It might be different if the pleadings, instead of admitting a consideration, had raised a question whether there was any consideration. Perhaps the rules of evidence would not admit that any thing should be added to what was stated in the deed. I throw out this only that I may not be precluded by our judgment this day from considering the question whenever it shall be necessary to decide it. We all think, that as the declaration states that the defendants for the considerations in the deed mentioned, covenanted, it *appears that the deed was for some consideration. The defendant should have cravedoyer of the deed, if he meant to object to the sufficiency of the consideration, and not having done so, we are to presume that it contains a legal consideration.

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For this reason the Court is of opinion that judgment must be for the plaintiff.

Judgment for the plaintiff accordingly.

C. P. HILARY TERM.

1826.
Jan. 24.

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KNIGHT v. BENETT.

(3 Bing. 361—364; S. C. 11 Moore, 222; 4 L. J. C. P. 94.)

Plaintiff entered a farm under an oral agreement for a lease for ten years; though the *time* of paying rent was settled, it did not appear what was the *amount* to be paid; the lease was never executed; but plaintiff occupied according to the terms of the proposed lease, and paid a certain rent for two years:

Held, that the lessor might distrain.

REPLEVIN. Avowry, for two years' rent, payable half-yearly, and due March 25th, 1824. To this the plaintiff pleaded *non-tenuit*, and *riens en arriere*. There were other avowries for the same amount of rent payable yearly, to which the plaintiff pleaded *riens en arriere* only, paying into Court a sum which would cover the alleged rent to Michaelmas, 1823.

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At the trial before Graham, B., Sussex Summer Assizes, *1825, a witness proved that he had arranged the terms of a proposed lease between the plaintiff and avowant for ten years from Michaelmas, 1820, as to every thing but the amount of the rent; that he told the plaintiff the rent was to be paid half-yearly, at Lady-day and Michaelmas; and that in April, 1821, the plaintiff, who had entered on the occupation of the farm, had told him he should pay the defendant half a year's rent in a few days.

No lease was ever drawn up. Another witness proved that the plaintiff had paid rent to Michaelmas, 1822, corresponding with the amount specified in the avowry; and that in April, 1824, he had promised to pay up to the preceding Lady-day.

It was objected that the plaintiff held only under an agreement for a lease, and not under any actual demise, and that there being no stipulation for the payment of a fixed rent, the avowant had no right to distrain.

A verdict, however, was found for the avowant, with leave for the plaintiff to move to set it aside, and enter a verdict for the plaintiff.

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Wilde, Serjt. accordingly, in the last Term, obtained a rule nisi to this effect, on the authority of *Hegan v. Johnson*,† and *Hamerton v. Stead*.‡

Taddy, Serjt., who shewed cause, suggested, that as the agreement was invalid under the Statute of Frauds, the plaintiff became tenant from year to year, and by the payments he had made, had sufficiently fixed the amount of the rent to entitle the defendant to distrain; when the Court called on

Wilde to support his rule :

He insisted as before, that there was an absence of any express demise or *of any stipulation as to the amount of rent to be paid, both of which were necessary conditions to the validity of a distress on an alleged demise for a sum certain.

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BEST, Ch. J. :

I am not disposed to question the authority of the cases which have been cited to shew, that the merely entering on premises in expectation of a lease will not constitute such a tenancy as to entitle the lessor to distrain. But these cases do not shew that such a tenancy as would authorise a distress, cannot be created by any other means except a formal lease. Such a tenancy may be implied from circumstances, and the question is, whether in the present case, sufficient circumstances were left to the jury to warrant them in drawing the conclusion they have come to. They were perfectly warranted in finding as they have done. It would be strange if a man could be allowed to occupy land for three years, and after having paid two years' rent and promised to pay what rent had since become due, could be permitted to say, "I have not been a tenant : I have only occupied in expectation of becoming a tenant."

† 2 Taunt. 148. [Not now law : Ch. Div. 9.—R. C.]
see *Walsh v. Lonsdale* (1882) 21 † 27 R. R. 407 (3 B. & C. 478).

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The evidence here is all one way. The witnesses prove that the tenancy was to commence from Michaelmas; that rent was to be paid half-yearly, and that it had actually been paid for two years, at the rate mentioned in the avowry. The facts of this case are, therefore, distinguishable from those which have been cited, and the verdict of the jury must stand.

PARK, J. :

The length of time during which the plaintiff was in possession and paid rent, obviates the difficulty which might have otherwise been occasioned by the omission to execute a lease.

[364] In this view, the cases which have been cited support the avowant's claim. In *Hegan v. Johnson*, the occupation *had only continued for three quarters of a year, and the Court said, "The occupier certainly did not become tenant from year to year at the beginning of the first month, or first three months;" from which, as well as from the language used in *Hamerton v. Stead*, it may be inferred that he would have been esteemed a tenant from year to year, if he had staid beyond the first year.

BURROUGH, J. concurred.

GASELEE, J. :

The agreement for a lease for ten years not having been reduced to writing was invalid: but the plaintiff having entered and occupied for more than a year under the terms of that agreement, it is clear, according to all the cases, that he was tenant from year to year.

Rule discharged.

KNIGHT *v.* BENETT.

(3 Bing. 364—367; S. C. 11 Moore, 227; 4 L. J. C. P. 95.)

1826.
Jan. 27.

[364]

By agreement, as well as by custom of the country, a tenant was to have the use of the barns and gate-rooms to thrash out his corn and fodder his cattle till the May Day after the expiration of his term; his term expired at Michaelmas, 1824; he was then restrained by injunction from carrying off the premises corn in the straw: in January, 1825, his landlord distrained a rick of corn on the premises: Held, that the distress was valid.

THIS was another replevin between the same parties, upon a distress of a rick of corn standing in a field. The avowry was for half a year's rent alleged to be due at Michaelmas, 1824, upon the same demise as in the preceding case. The plaintiff pleaded *non tenuit*.

Upon the trial it appeared that the plaintiff had, under a notice to quit, ceased at Michaelmas, 1824, to occupy the premises in respect of which the distress was *made: that by an injunction out of Chancery he had been restrained from carrying off the premises corn in the straw; but that by the conditions under which he had occupied, as well as by the custom of the country, he was to have the use of the barns and gate-room, &c. to thrash out his corn and fodder his cattle, till the May Day after the expiration of his term. The distress was made in January, 1825.

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A verdict was found for the avowant, with liberty for the plaintiff to move to set it aside and enter a verdict for the plaintiff, on the ground that the plaintiff's interest in the premises having determined, and he having ceased to occupy them, a distress could not be made under the statute of 8 Ann. c. 14.

Wilde, Serjt. having obtained a rule *nisi* accordingly, the Court stopped *Taddy*, Serjt., who was to have shewn cause, and called on

Wilde to support his rule:

The plaintiff's interest in the premises determined at Michaelmas, 1824. The custom of the country prevails only for the benefit of the occupier, to enable him to carry off the crops he

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may have raised ; and if he does not claim the benefit of the custom, he cannot be liable to the burthens it may impose. The plaintiff disclaimed any intention to occupy beyond the expiration of his term ; and his corn was detained on the premises against his will by the party who afterwards distrained it. If he had left the corn voluntarily, it might have been liable to distress by virtue of the custom, but the avowant ought not to be allowed first to detain, and then to distrain the corn. The statute 8 Ann. c. 14, only applies where the tenant continues in possession ; but the plaintiff had quitted the premises long before the distress.

[366] BEST, Ch. J. :

The express contract between these parties is for a holding from Michaelmas to Michaelmas, but there is an implied contract under the custom of the country, that the tenant shall continue possession for the purpose of thrashing and foddering, up to the May Day ensuing ; and the question is, whether the landlord could distrain between Michaelmas and May Day for the rent due at Michaelmas. The statute of Anne does not apply to the point, because that statute gives a right to distrain for six months after the determination of the lease, where the interest of the landlord and the possession of the tenant continues.

But in the present case the interest under the lease was not determined ; and the case of *Bearan v. Delahay*[†] decides the question. It was holden in that case that a custom for a tenant to leave his away-going crop in the barns of the farm for a certain time after the lease is expired, and he has quitted the premises, is good, and the landlord may distrain the corn so left after six months have expired from the determination of the term. Lord LOUGHBOROUGH said, “ It has often been determined that if there be a lease, and after the determination of it the tenant holds over, he must hold upon the terms, and liable to all the conditions and covenants of the lease ; and it is not material whether the interest and connection between the landlord and tenant be extended by such holding over, or by the operation of a custom.”

[†] 2 R. R. 696 (1 H. Bl. 5).

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This case is one of a continuing tenancy, and *Beavan v. Delahay* is conclusive on the point under consideration. That decision was confirmed in *Boraston v. Green*,† where BAYLEY, J. considered such a custom a *prolongation of the term during which the landlord might distrain for the off-going rent. The statute of Anne does not apply, because the term is continued by the custom of the country.

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BURROUGH, J.:

In corn countries the custom of the country arises out of the necessity of the thing, for without such a custom the tenant could not get in his corn in late harvests. But as he is bound to thrash it out on the land, the custom of the country enures as much to the benefit of the landlord as of the tenant. The tenant by taking away his corn could not put an end to the contract under which he was bound to thrash it on the premises; and the tenancy continuing by the necessary custom of the country, the object of the injunction was only to compel him to do what he was bound to do under his contract. I have no doubt that the tenancy continued, and that the landlord had a right to distrain independently of the statute of Anne.

GASELEE, J.:

The question is, what was the expiration of the tenant's term, and the case of *Wigglesworth v. Dallison*‡ clearly shews that the expiration may depend on the custom of the country.

Rule discharged.

† 14 R. R. 297 (16 East, 71).

‡ Doug. 201.

1826.
Jan. 25.
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CROWDER v. AUSTIN.†

(3 Bing. 368—369; 11 Moore, 283; 4 L. J. C. P. 118; S. C. at Nisi Prius, 2 Car. & P. 208.)

The vendor of a horse stationed his servant to join in the bidding at a public auction, and the servant bid up to 23*l.* after a *bonâ fide* bidder had bid 12*l.* :

Held, that the sale could not be enforced against a subsequent bidder.

THE plaintiff sought to recover the price of a horse sold by him to the defendant at a public auction, one condition of which auction was, that the horse should be sold to the best bidder. The defendant, himself a horse dealer, resisted completing the contract, on the ground that after a *bonâ fide* bidder had bid 12*l.* a servant of the plaintiff's, stationed by him at the auction, made repeated biddings up to 23*l.*

At the trial before Best, Ch. J., London sittings after Michaelmas Term, the plaintiff having been nonsuited upon proof of these facts,

Wilde, Serjt. now moved for a rule *nisi* to set aside this nonsuit :

He argued, that the decisions in which it had been holden that a contract of sale might be avoided upon proof that the seller had resorted to puffing, turned upon a presumption that a fraud had been practised upon the purchaser : *Howard v. Castle*.‡ But since those decisions, puffing, or at all events, bidding with a view to buy in, had become so much the recognized practice of auctions, that it was impossible to say that any purchaser could be deceived by it, much less such a purchaser as the defendant, himself a horse dealer, and conversant with every mode of disposing of horses.

The practice of bidding for the purpose of buying in, is recognized by the Legislature, which has provided for the remission of the duty :

[*369] (BEST, Ch. J. : But *notice ought to be given of the intention to buy in.)

† Sale of Goods Act, 1893, s. 58 (3). ‡ 3 R. R. 296 (6 T. R. 642).

And the LORD CHANCELLOR has sanctioned it in sales under the authority of the Court of Chancery: *Conolly v. Parsons*.† Whether the buyer has notice from the seller, or from the notoriety of the general usage, is indifferent. The language of Lord MANSFIELD, in *Bezwil v. Christie*,‡ applies to a period when the practice was not so notorious as at present.

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BEST, Ch. J. :

I am of the same opinion as I was at the trial, where I thought the whole transaction was a fraud on the defendant; but as the question is of importance, it may not be improper to grant a rule *nisi*.

PARK and BURROUGH, JJ., thought a rule ought not to be granted, expressing their entire concurrence in the opinion expressed by Lord MANSFIELD.

GASELEE, J. thought Lord MANSFIELD's decision satisfactory, but as it had once been objected to, was willing that a rule *nisi* should be granted.

A rule *nisi* was granted accordingly; but

Wilde, Serjt. on a subsequent day finding the Court still of the same opinion, said he was instructed by his client to carry the case no further. By his own consent, therefore, the rule was

Discharged.

† 3 Ves. 625, n. [But see now 30 & 31 Vict. c. 48.—R. C.]

‡ Cowp. 395.

1826.
Feb. 3.

[383]

DOUGAL v. KEMBLE AND ANOTHER.

(3 Bing. 383—393; S. C. 11 Moore, 250; 4 L. J. C. P. 103.)

Goods were consigned to L. C. & Co. or their assigns, "he or they paying freight for the same." L. C. & Co. indorsed the bill of lading to K., their broker, and then became bankrupt; the ship-owner, in ignorance of these circumstances, applied to L. C. & Co. for the freight, and then sued K. for it:

Held, that K. was liable.†

THIS was an action of assumpsit, to recover the freight and primage of some sugars conveyed by the plaintiff from the West Indies to London.

At the trial before Best, Ch. J., London sittings after Trinity Term last, a verdict was found for the plaintiff for 200*l.* damages, subject to the opinion of the Court on the following case:

The brig *Pursuit*, whereof the plaintiff was the owner, took in a cargo of sugars at the island of St. Lucia, and arrived with the same in the West India Docks, where the cargo was afterwards landed and warehoused. Sundry hogsheads of sugar forming part of the cargo were marked C. L.; others, F. D.; others, M. D. Bills of lading were signed by the captain of the ship for the sugar in question, by two of which, the portion of sugar marked F. D. and M. D. was made deliverable to the shipper's orders, or to assigns, he or they paying freight for the same, with primage and average accustomed. By the third, the sugars marked C. L. were made deliverable to J. R. Le Cointe & Co., or to assigns, he or they paying freight for the same, with primage and average accustomed.

The bill for the sugars marked F. D. was indorsed, "Deliver the within hds. of sugar to Messrs. Le Cointe and Co., provided they accept my draft of this day's date in favour of Messrs. D. Ferguson and Co. for 200*l.* sterling, at ninety days sight, otherwise to the holder of the said draft, 18th September, 1824." (Signed SALVIGNY.)

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The bill of exchange referred to by the bills of lading was duly accepted by Le Cointe & Co. previously to the bills of lading being handed to them.

† See note to *Cock v. Taylor*, 12 R. R. 378.—R. C.

The sugars marked F. D. and M. D. were entered on the 9th of November, 1824, by the owner of the ship at the Custom-house, to be warehoused in pursuance of the statute of 4 Geo. IV. c. 24.

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v.
KEMBLE.

On the same day, the captain, on the part of the owner of the ship, gave notice to the directors of the West India Docks Company to stop the sugars F. D. and M. D. till the freight was paid.

The sugars marked C. L. deliverable by the bills of lading to Le Cointe & Co. were not then stopped as the others.

On the 25th of November, and 10th and 13th of December respectively, the defendants presented at the West India Docks office, the three bills of lading before mentioned, the one of which for the sugars marked C. L. had been previously indorsed and delivered by Le Cointe & Co. to the defendants; and the two bills of lading for the sugars, marked F. D. and M. D. had been indorsed by the shippers to Le Cointe & Co., and had also been indorsed and delivered by Le Cointe & Co. to the defendants: and under and by virtue of the bills of lading and indorsements thereon, the defendants obtained the transfer of the sugars into their names in the warehouse and books of the Dock Company.

On the 16th of November the defendant's clerk applied to Messrs. Robertson & Co., who were brokers for the ship, on account of the plaintiff, and requested that the stop which had been put upon the sugars in pursuance of the captain's notice before mentioned, might be taken off from the sugars marked *F. D. and M. D., and that the said sugars might be delivered out of the docks; and Messrs. Robertson & Co. thereupon signed an order, addressed to the collector of the West India Dock Company, withdrawing the stop, and desiring that the goods in question might be delivered to Le Cointe & Co., the consignee thereof, or their assigns.

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This order was brought by the defendants' clerk to the dock collector.

On the 16th December Le Cointe & Co. suspended their payments, on the 1st January, 1825, committed acts of bankruptcy, and on the 5th January a commission of bankruptcy was issued

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against them, which was inserted in the *Gazette* of the 8th January.

The plaintiff's brokers, who collected the freight for the ship, on account of the plaintiff, on or about the 4th January, in the usual course, sent an account of the freight note to Messrs. Le Cointe & Co., charging them as debtors for the same. Up to and at this time the brokers did not know that the bills of lading had been endorsed by Le Cointe & Co. to the defendants, or that Le Cointe & Co. had suspended their payments, or had committed any acts of bankruptcy.

On the 8th January the plaintiff's brokers applied at Le Cointe's & Co. for payment of the freight, and were then first informed of their having suspended their payments.

And the plaintiff's brokers, on the same 8th January, first learnt by enquiring at the West India Dock-office, that the bills of lading had been indorsed to the defendants; the brokers thereupon applied for and obtained back the freight note from Le Cointe & Co., and on the 8th day of January delivered a freight note to the defendants, charging them as debtors for the same.

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On the 10th and 11th of January, 1825, Messrs. Robertson & Co. and the plaintiff gave further notice to the directors of the Dock Company, countermanding the withdrawal of the stop for freight, and ordering all the goods to be detained.

The sugars were subsequently delivered out of the docks to the order of the defendants, who paid the dock dues for landing all the sugars, which included three months' warehouse-rent for the same from the time of landing.

The freight for the sugars, according to the bills of lading, was

				£	s.	d.
For sugars marked C. L.	-	-	-	38	12	10
Do. F. D.	-	-	-	85	19	8
Do. M. D.	-	-	-	1	6	10
				<hr/>		
				£125	19	4

which freight, according to the course of trade, was payable on the Saturday, upon or next after the expiration of two months from the ship's report, viz. on the 15th day of January, 1825.

The defendants were sugar-brokers in the city of London; were employed by Le Cointe & Co. to sell the sugars in question, and had advanced Le Cointe & Co. sums of money on account thereof at the times the bills of lading were delivered to them as aforesaid.

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The defendants, in their account with Le Cointe & Co. debited them with the amount of payments made by the defendants in respect of the sugars, and paid over to the assignees of Le Cointe & Co., subject to the decision of this question, the balance of the proceeds of the sale of the sugars, after deducting such payments, and the charges of sales, and also after deducting the advance which they had made, *and the amount of the freight claimed in the present action.

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The question for the opinion of the Court was, whether the plaintiff was entitled to recover the whole or any part of the sum of 125*l.* 19*s.* 4*d.*, and the verdict was to be entered accordingly

Wilde, Serjt. for the plaintiff :

By the general rule of law, a party who receives a bill of lading, knowing that freight has not been paid, receives it under an implied contract to pay the freight : *Bell v. Kymer*;† *Cock v. Taylor*;‡ and under the Act for regulating the West India Docks, goods in dock are in the same situation with respect to claims for freight as goods on board ship. Here the freight is made payable by the holder of the bill of lading; the defendants receive the goods under the bill, with notice that the freight is not paid; and as to the plaintiffs taking the stop off the goods, that was no more than a consent that they should be delivered pursuant to the terms of the bill of lading, without releasing any party who might be found liable to pay the freight. The demand on Le Cointe & Co. was made in ignorance that the bill of lading had been transferred, and therefore cannot affect the plaintiff's case.

Here the COURT called on

Taddy, Serjt. for the defendants :

Freight is only recoverable by reason of a contract; a contract

† 5 Taunt. 477; 1 Marsh. 146.

‡ 12 R. R. 378 (13 East, 399).

DOUGAL cannot be transferred, and the owner of a ship contracts for his
 v.
 KEMBLE. freight with the shipper.

(GASELEE, J.: According to the cases the knowledge of the terms of a bill of lading is evidence of a new contract.)

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It sometimes happens that the ship-owner has no remedy against the original *shipper; and in those cases the Courts have holden the receiver of the goods liable; that was the ground of the decision in *Cock v. Taylor*; but the Court said, in *Wilson v. Kymer*,† which is in point for the present defendant, that they would not go beyond that case. In *Wilson v. Kymer* the defendants were at first holden not liable; and though the ultimate decision was different, yet that turned on the ground of previous dealing between the parties. In *Cock v. Taylor* the defendants were purchasers of the bill of lading; in the present case the defendants are not purchasers of the bill of lading, nor do they receive the goods under it, but by virtue of the order of Robertsons, as the agents of Le Cointe & Co. In *Moorsom v. Kymer*,‡ where ship-owners were to be paid for the hire of a ship under the terms of a charter-party, and the bill of lading was to deliver the goods to the charterers or their assigns, he or they paying freight as per charter-party, it was holden that the indorsees of the bill of lading were not liable to the ship-owner upon an implied assumpsit arising out of the receipt of the goods under the bill of lading. And though in *Bell v. Kymer* they were holden liable to the charterer, that decision turned upon the particular conduct of the indorsers.

The liability of consignees rests on the custom of trade: *Roberts v. Holt*,§ which does not extend to indorsees. The credit here was certainly given by the ship-owner to Le Cointe & Co.: he applied to them first for payment; if he had sued them, it would have been no defence for them to have said that the bill of lading had been handed over to Kemble & Co.; and if Le Cointe & Co. are liable, Kemble & Co. are discharged. They only act as brokers, and it will be a great hardship if they are

† 1 M. & S. 157.

§ Show. 443.

‡ 15 R. R. 261 (2 M. & S. 303).

held liable. At all events, a *count on general assumpsit for freight is not sufficient as to those goods for which the freight was to be paid by the acceptance of a bill at ninety-days' sight. That was a special engagement, and ought to have been described in a special count.

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BEST, Ch. J. :

It being clear that justice will be done by allowing the verdict for the plaintiff to stand, the Court has only to see that its judgment is not inconsistent with previous decisions. It has been insisted, on the part of the defendants, that the verdict for the plaintiff is inconsistent with the law of England, because the contract on the bill of lading is with the shipper or Le Cointe & Co., and that the liability of these parties cannot be transferred to the defendants. But this argument is founded on an inaccurate statement of the terms of the bills of lading. Neither the shipper nor Le Cointe & Co. agree by these instruments to pay the freight. These are receipts for the goods, with an undertaking on the part of the captain that he will deliver them to the legal holder of these bills, on such holder's paying the freight. The captain has a lien for the freight against whoever shall become the owner of the goods. The owner could not compel the captain to deliver the goods from his actual possession without paying the freight. The Act for regulating the West India Docks continues the lien for freight whilst goods delivered from a ship, and liable to freight, remain in those docks. Whoever obtains the delivery of goods under such a bill of lading, contracts, by implication, to pay the freight due on them. There is no assignment of contract, no shifting of liability. The receiver of the goods is an original contractor to pay the freight of them. With respect to the alleged hardship on brokers, they know the terms of the bill under which they claim, they know what freight is due, and they need not make *advances beyond the value of the goods subject to freight ; the hardship on the ship-owner would be much greater if, after having brought the goods to England, he should not be entitled to recover freight from the parties who possess them under the bill of lading. *Cock v. Taylor* is expressly in point for the

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plaintiff. It has been attempted to distinguish that case from the present by the circumstance, that the plaintiff in that case had made no application to the consignee before applying to the defendant, and that the defendant was there a purchaser of the bill of lading. With respect to the application to the consignees, it was made when the plaintiff supposed them to be the holders of the bills of lading; the moment the plaintiff discovered that the bills of lading had been transferred to the defendants, he applied also to them; and a man is not bound by what he does in ignorance of the actual circumstances of his case. As to the circumstance of the defendant in *Cock v. Taylor* being a purchaser of the bill of lading, the effect of that is got rid of by *Bell v. Kymer*, in which the defendant was only a broker, and in which GIBBS, Ch. J. said, "the holders of a bill of lading were bound to know that they were liable for the freight." That decision is not touched by any subsequent case, for *Wilson v. Kymer* turned on a different point; and every Judge in that case confirmed the decision in *Cock v. Taylor*. In *Wilson v. Kymer* the defendants did not obtain the goods under the bill of lading, but under the order of the consignees. In *Moorsom v. Kymer* the inference of an implied contract was repelled by the existence of a special contract under a charter party; and LE BLANC, J. said, "The law will not raise an implied promise where there is an express agreement between the parties." But he also said, "Where the ship is a general ship, and there is no other to whom the party can resort, the law will imply a promise to prevent a failure of justice." *There would be a failure of justice if such a promise were not implied in the present instance.

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With respect to the declaration, the contract having been executed, the plaintiff is entitled to recover on the general count for freight, which was the form of the declaration in *Cock v. Taylor*.

PARK, J. :

The arguments which have been urged on the part of the defendants to-day, were pressed in many of the prior cases, but in vain; and the authority of *Cock v. Taylor* has remained unimpeachable.

Wilson v. Kymer and *Moorsom v. Kymer* are plainly distinguishable on the ground stated by my LORD CHIEF JUSTICE. And in *Bell v. Kymer*, which was decided by GIBBS, J., a man most eminent for his knowledge of commercial law, the defendants were brokers, and the decision in *Cock v. Taylor* was confirmed.

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BURROUGH, J. :

I agree as to the justice of this case, and that we are now bound by the decision in *Cock v. Taylor*, although if I had been a Judge of the Court of King's Bench when that case was argued, I am doubtful whether I should have concurred in the decision.

With respect to the declaration, I think that a general count for freight is not sufficient between these parties. It might have been sufficient between the ship-owner and the consignees after the contract was executed, but when the ship-owner parts with the goods, he relies on the undertaking of the party to whom the goods are delivered; and as against him the declaration should be framed specially on the undertaking, and not on the common liability to pay freight, which seems to attach only on the shipper or consignee.

GASELEE, J. :

It is not material now to decide whether an action like this against the indorsees of a bill of *lading, ought originally to have been sustained on a general count for freight; such a count has been sustained in *Cock v. Taylor*, and that decision has never been overruled. I concur, therefore, with the rest of the Court that there must be

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Judgment for the plaintiff.

1826.
Feb. 3.

BUTTERY v. ROBINSON.†

3 Bing. 392—393; S. C. 11 Moore, 262; 4 L. J. C. P. 108.)

[392]

Devise of lands to A. for life, remainder to B. in fee, subject to and charged with the payment of 20*l.* a year to C. D. during her life, to be paid by A. as long as she should live, and after her decease to be paid by B. :

Held, a charge on the land, for which C. D. might distrain.

REPLEVIN. The defendant avowed for the arrears of a rent-charge which he claimed under a will by which one Mathew Robinson devised the premises in which, &c. to his wife for life, remainder to his sons in fee, “but subject nevertheless to and charged and chargeable with the payment of the yearly rent or sum of twenty pounds, thereby then and there devised and given by the said Mathew Robinson to the said defendant and her assigns during the term of her natural life, to be paid by his the said testator’s said wife so long as she should live, and after her decease to be paid by his said sons equally between them, by four equal quarterly payments, the first payment thereof to begin and be made at the end of three calendar months next after his the said testator’s decease.”

Plea. That the said Mathew Robinson did not give in or by his said will any power or right of distress, nor is any clause or power of distress therein contained to enable the said defendant to levy any arrears of the said yearly rent or sum so given, and bequeathed to her by the said will as aforesaid in case such yearly rent or sum should at any time be in arrear. Demurrer and joinder.

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Spankie, Serjt. rose to support the demurrer, but the Court called on

Peake, Serjt. to support the plea :

He argued that this was not a rent seck, in which case it might have been distrained for under 4 Geo. II. c. 28 (s. 5), but a mere personal charge on the party who should be in possession

† Followed and applied by V.-C. 73; and in *Roper v. Roper* (1876) MALINS in *Sollory v. Leaver* (1869) 3 Ch. D. 714, 720.—R. C. L. R. 9 Eq. 22, 25; 39 L. J. Ch. 72,

of the land, to pay the annuity so long as he should possess the land; and though equity might call the land in aid of the personalty if the possessor proved insufficient, yet there could be no distress under the will.

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BEST, Ch. J. :

It is impossible to read the words of this will without holding the sum bequeathed a direct charge on the land, which is expressly devised "subject to and charged and chargeable with" the payment of the yearly sum.

Judgment for the avowant.

C. P. EASTER TERM.

WALLS v. ATCHESON.

(3 Bing. 462—463; S. C. 11 Moore, 379; 4 L. J. C. P. 154; S. C. at Nisi Prius, 2 Car. & P. 268.)

1826.
April 24.
[462]

Where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant: Held, that she could not recover in an action for use and occupation against the lessee for a subsequent portion of the year during which the apartments had been unoccupied:

Held, also, that by the admission of another tenant she dispensed with the necessity of a written surrender.

ASSUMPSIT for use and occupation.

At the Middlesex sittings before Best, Ch. J., in this Term, the case was as follows:

On the 14th September, 1824, the plaintiff let furnished apartments to the defendant at sixty-five guineas for a year.

The defendant paid one quarter's rent to the 14th December, and then quitted the lodgings.

The apartments remained vacant till the 9th January, twenty-six days, when the plaintiff let them to another lodger, at a guinea a week. But in the beginning of April the defendant's attorney paid the plaintiff's attorney the sum of 7*l.* 5*s.*, which had been demanded of the plaintiff in respect of the rent of the apartments.

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The plaintiff continued to let the apartments to other lodgers till the beginning of July; but failing to procure lodgers from that time till the 14th September, she sued the plaintiff for 21l. 0s. 6d., the sum requisite to complete sixty-five guineas for the year.

There being no evidence to shew that the plaintiff had re-let the apartments on behalf of the defendant, the LORD CHIEF JUSTICE thought she had rescinded the contract with the defendant, and directed a nonsuit.

Vaughan, Serjt. now moved to set aside this nonsuit, and have a new trial, on the ground that nothing appeared in the facts of this case to discharge the defendant from his original liability. The plaintiff in re-letting the apartments had let solely on his account, and had received the rent to his use. [*463] He cited *Redpath v. Roberts*,† in which it was holden that if a tenant abandon premises without notice, the landlord is not precluded from recovering the subsequent rent by putting up a bill at the window, and endeavouring to procure another tenant; also *Mollett v. Braine*,‡ in which it was holden that a lease from year to year cannot be surrendered to the lessor by parol, and that a tenant who quits in the middle of a quarter, under an oral licence from the landlord, is bound to pay rent to the end of the year.

But the COURT thought that the plaintiff having precluded the defendant from occupying his apartments by letting them to another person, must be taken to have rescinded the agreement, and to have dispensed with the necessity of a surrender: that she ought to have given the defendant notice, if her intention was to let the apartments solely on his account: and PARKE, J. referred to the case of *Lloyd v. Crispe*,§ where the lessor, having consented to the introduction of another occupier, was holden to have no claim on the lessee, who was under covenant not to assign except with licence.

Rule refused.

† 3 Esp. 225.

‡ 11 R. R. 676 (2 Camp. 103).

§ 14 R. R. 744 (3 Taunt. 249).

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(3 Bing. 463—471; S. C. 11 Moore, 421; 4 L. J. C. P. 169.)

1826.
April 26.

[463]

Where several persons jointly interested agreed to horse a coach, each of them one stage, on the road from L. to B., and that, in case of default, one of them should sue the defaulter for a penalty which should be divided among the non-defaulters: Held, that an action might be maintained on the agreement against a defaulter by the party so appointed to sue, and that the others need not join in the action.

But an agreement between members of a firm could not, as against a person not a party to the agreement, give authority to one of the firm to sue in his name alone on behalf of the firm. Per BEST, Ch. J.

At the last Warwick Assizes, before Best, Ch. J., the plaintiff obtained a verdict for 250*l.*, on a declaration which stated that on the 14th day of February, *1825, at Birmingham, in the county of Warwick, by a certain agreement in writing, then and there made by and between plaintiff and defendant, together with one George Cole, one Henry Wakefield, one John Scott, and one Thomas Emery, it was declared that they whose signatures and places of residence were at the foot of the said agreement, subjoined thereby, mutually and reciprocally bound themselves, each to the other, under the conditions and restrictions thereafter recited, (that is to say,) they agreed in common accordance to forthwith establish a stage-coach, to be worked or conveyed by them respectively from Birmingham aforesaid, in the said county of Warwick, to Liverpool, in the county of Lancaster, and to be returned or conveyed over the same line of journey to Birmingham, in a manner and time of conveying the same as thereafter stated, each of them respectively thereby having described in writing against their signatures severally that part of the journey aforesaid which they and each of them agreed to horse and convey the said coach, and the time and manner of so doing, and they thereby mutually and reciprocally agreed each with the other that such statement against their respective signatures should be a part of that memorandum of agreement: then, for the better and more immediately carrying the object of that agreement into effect, they further mutually and reciprocally bound themselves each to the other to the following stipulated forfeitures or penalties, ranged with the specific condition to the said agreement attached, and that such forfeitures or

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penalties respectively should, and it was thereby severally agreed, be paid as liquidated damages ; and that plaintiff should receive all and every of such forfeitures and penalties or penalty that might accrue accordingly, and in default of payment by any of the party or parties to the said agreement, that plaintiff might and was thereby authorized and empowered by them mutually to sue in legal process for the same ; and that the amount of such forfeiture, *penalty, or penalties, should be divided amongst the parties to that agreement who should not have subjected themselves to any such forfeitures, penalty, or penalties, as aforesaid, to the exclusion of any and every defaulter under the circumstances aforesaid, as to sharing in any part thereof. And it was thereby severally and conjointly agreed, first, that every party or person to the said agreement who should not be ready at the stipulated time of commencing to work and convey the stage-coach intended to be established as aforesaid over that part of the journey that he thereby undertook and agreed to horse and convey the said coach, and did not horse and convey the same accordingly, should forfeit the sum of 50*l.*, to be recovered and applied as thereinbefore recited and stipulated. And it was thereby further mutually and reciprocally agreed that such stage-coach or coaches should commence to be conveyed over the said journey on Monday, the 21st day of March then ensuing, that is, two coaches daily, and every day, the one to leave Birmingham, and the other Liverpool ; and that the said journey should be performed each way in thirteen hours and a half, the proportion of the said time assigned to each, being attached in writing against the signature of each proprietor. And in order to preserve the good faith indispensable to the well-doing of the proprietors of the said coaches, it was mutually and reciprocally agreed by each with or to the other, that neither of them should directly or indirectly be concerned in or promote the interests of any other coach whatever, that might be worked from the two extremities, namely, from or to Birmingham and Liverpool, but that their interest and best efforts should be applied to the coach then in contemplation, and agreed to be established, and for any and every violation of such good faith, the person or persons respectively should forfeit as a penalty

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200*l.*, to be recovered *and applied as in such cases theretofore stipulated. And it was further mutually and reciprocally agreed by the parties to the said agreement that there should be three coachmen and two guards employed on the said coaches; and it was further agreed by the parties that for officing the coach at each extremity, including stationery, books, lights, porters, and clerks, one guinea should be allowed at the Birmingham, and one guinea at the Liverpool end weekly, and deducted from the earnings of the coach in accounts in progress; and it was further mutually and reciprocally agreed by the parties aforesaid, each with the other, that no party or person to the said agreement should cease to convey the said coach, or impede it on its journies by not conveying or causing it to be conveyed over his proportion of the journey, agreeable to his undertaking, under the forfeiture of 100*l.* liquidated damages to be paid by him, to be applied in manner aforesaid; that is, in the understanding of coach phraseology, he should not take off his horses, unless he should give three months' notice in writing previously to the proprietors severally of his intent so to do; and that all the penalties should, and it was severally agreed might be retained by plaintiff out of any money that might come to his hands on account of the person or persons subject to such penalty or penalties. And plaintiff further saith, that the signatures at the foot of the said agreement subjoined, and the several parts of the said journey which the parties signing the said agreement, and each of them, agreed to horse and convey the said coach, and which were described in writing against the signatures, were as follows, that is to say, Charles Radenhurst (the plaintiff) from Birmingham to Wolverhampton; George Cole from Wolverhampton to Stafford; Henry Wakefield from Stafford twenty miles further towards Liverpool; John Scott the ground from Liverpool to Northwick; Thomas Emery *from Sandwich to Northwick, eleven and half miles, and back; M. Bates (the defendant) fourteen miles from Hanley to Sandback and back, and two hours to work the same. And the said agreement being so made, afterwards, to wit, on, &c. at, &c. in consideration thereof, and that plaintiff, at the special instance and

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request of defendant, had then and there undertaken and faithfully promised defendant to perform and fulfil the said agreement in all things in his part and behalf to be performed and fulfilled, defendant undertook, and then and there faithfully promised plaintiff to perform and fulfil the said agreement in all things on his part and behalf to be performed and fulfilled. And plaintiff further saith that afterwards, to wit, on, &c. at, &c. it was stipulated and agreed by and between the said parties to the said agreement, that the time for commencing to work and convey the said coach over that part of the said journey over which defendant so undertook and agreed to horse and convey the said coach, should be the 21st day of March in the year aforesaid, and that afterwards, to wit, on, &c. the said stage-coach on its said journey from Birmingham to Liverpool arrived at Hanley aforesaid, for the purpose of being then conveyed by defendant to Sandback aforesaid, being his proportion of the said journey as in the said agreement mentioned, to wit, at, &c. and that defendant was then and there duly required to convey the said stage-coach from Hanley aforesaid to Sandback aforesaid accordingly ; yet defendant, not regarding the said agreement, nor his aforesaid promise and undertaking, was not ready at such stipulated time to convey, nor did, nor would, when so required, convey the said coach from Hanley aforesaid to Sandback aforesaid, but then and there wholly refused so to do, contrary to the tenor and effect of the said agreement, and of his aforesaid promise and undertaking; by means of *which said several premises, defendant afterwards, to wit, on, &c. at, &c. became liable to pay to plaintiff the said forfeiture of 50*l.* liquidated damages to be applied in manner in the said agreement mentioned, when he should be thereto afterwards requested.

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There was a further breach charging the defendant with having promoted the interests of another coach.

Vaughan, Serjt. moved for a rule to shew cause why the judgment should not be arrested, on the ground that the consideration alleged for the defendant's promise was a promise by the plaintiff, whereas, upon examining the agreement, the

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consideration appeared to be a promise or engagement of the plaintiff and several others with whom in effect the defendant was a partner under the agreement, and, therefore, not liable to be proceeded against at law; that at all events all the other parties ought to have joined in the action; and also that there was no sufficient allegation of performance of the plaintiff's part of the contract.

A rule *nisi* having been granted [and having been argued, the Court took time for consideration].

BEST, Ch. J. who gave the judgment of the Court, (after stating the declaration), said : [469]

Several objections have been made to this declaration in arrest of judgment. First, it has been insisted that this agreement makes the parties to it partners, and, therefore, if any of them have any claims against the others, they must go into a court of equity. What is sought to be recovered by this action is not partnership property; the plaintiff and the defendant are not tenants in common of it; the defendant has no interest in it. It is a penalty to be paid by the defendant to the plaintiff for the use of the other contracting parties, the defendant himself being by the agreement expressly excluded from any share of it. There are no accounts to be settled before this claim can be decided, and, therefore, no one reason why this case may not be disposed of in a court of law, or why the parties should be subjected to the expence and delay that must attend a suit in equity. The courts of law should be careful not to narrow their jurisdiction. Wherever complete justice can be attained in a *court of law, a suit should be entertained if the thing claimed be a legal and not an equitable right. [*470]

The second objection is, that all the contracting parties amongst whom the penalties are to be divided should have joined in the action.

We think that the members of a firm cannot, by agreement, give an authority to any one of them to bring an action in his name against persons not members of the firm; but where several parties create by agreement penalties to be paid by one

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of them to the others, we see no objection to their empowering one to sue for the others. Such an agreement is in effect an undertaking not to object on account of all who ought otherwise to have been joined in the action not being joined.

If there had been any thing in this objection, it might have been taken in *Davies v. Hawkins*,† but it was not started either by the Bench or Bar. Corporations often make bye-laws, and by those laws direct that penalties shall be recovered against their members in actions brought by the head of the corporation for the use of the corporation. Such actions are properly brought in the name of the head of the corporation only. The right to maintain actions by corporations is founded on agreement between the members, as in the present case.

The third objection is, that there is no mutuality in the agreement, because if the plaintiff incurred a penalty he could not sue himself. That would be a case not provided for by the agreement, and, therefore, all the other contracting parties who had incurred no penalty, must join in the action against him; they would thus obtain equal redress, although not in precisely the same manner.

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Where an Act of Parliament directs that a company shall sue and be sued in the name of their clerk, and he has a claim against them for wages, he cannot sue himself, but must, notwithstanding the provision in the Act, sue the company.

The next objection is, that the consideration of the defendant's promise is not correctly set out in the declaration. It is insisted that it should have been stated, that he made his promise to fulfil the agreement in consideration of all the other contracting parties having promised him to fulfil the agreement on their parts, and not as it is stated in the declaration, in consideration of the plaintiff's having promised to fulfil his part of the agreement.

But the agreement is set out, and it is stated, that, in consideration of the premises, the defendant undertook. This, we think, is sufficient, and that the other allegation is surplusage.

The last objection is, that it is not averred that the plaintiff or the other contracting parties performed their parts of the agreement. It does appear on the declaration that the coach was

† 3 M. & S. 488.

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brought to the defendant's house, from whence he was to convey it on. This is the only thing that looks like a condition precedent to the performance of the defendant's duty. Although this may not be set out with perfect precision, we think it cannot be objected to after verdict. The plaintiff, therefore, may recover the 50*l*.

With respect to the 200*l*. for supporting another coach, there was no condition, precedent to be performed by the plaintiff before he could recover that penalty; and, therefore, we think that after verdict no objection can prevail against the plaintiff recovering that penalty on account of want of averment of the performance of any duty.

Rule discharged.

SPROTT v. POWELL AND ANOTHER.

(3 Bing. 478—486; S. C. 11 Moore, 398; 4 L. J. C. P. 161.)

1826

May 1.

Vestrymen who signed a resolution, ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were held not to be responsible for the payment of the attorney employed by the surveyor.

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ACTION for the amount of an attorney's bill.

At the last Maidstone Assizes, before the Lord Chief Baron, the case appeared to be as follows :

At a special vestry for the parish of Speldhurst, holden in April, 1821, the following resolutions were entered into :

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"Speldhurst parish. At a special vestry, held in the said parish, the 27th April, 1821, (pursuant to public notice,) for the purpose of taking into consideration the propriety of resisting an indictment instituted against the inhabitants of the said parish to compel them to repair a certain piece of road ;

"Resolved, that the above indictment be opposed.

"2nd. That the surveyors be desired to take the necessary steps for carrying the first resolution into effect." Signed by the two defendants and six other parishioners.

The plaintiff at this time was present as vestry clerk, and Robert Fry, the then surveyor, gave him instructions to defend the indictment.

The indictment was defended.

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In October, 1824, the plaintiff delivered his bill to James Richardson, the then surveyor, but who had not been surveyor in 1821. The bill was headed, "The surveyors of the parish of Speldhurst Drs. to Walter Sprott." Richardson refusing to pay, the plaintiff commenced the present action against the defendants. They resisted payment on the ground that the surveyor for the current year was the person who ought by a rate on the parish to raise the necessary funds, and from time to time to satisfy claims such as that made by the plaintiff. This was expressly provided for by the 13 Geo. III. c. 78, s. 56,[†] by which it is enacted, "That if the inhabitants of any parish, township, or place shall agree at a vestry or public meeting to prosecute any person by indictment for not repairing any highways within such parish, township, or place which they apprehend such person is obliged by law to repair, or for committing any nuisance upon such highways, or shall agree at such vestry *meeting to defend any indictment or presentment preferred against any such parish, township, or place, it shall and may be lawful for the surveyor of such parish, township, or place, to charge in his account the reasonable expences incurred in carrying on or defending such prosecution or defence respectively, after the same shall have been agreed to by such inhabitants at a vestry or public meeting, or allowed by a justice of the peace within the limit where such highway shall be, which expences when so agreed to or allowed, shall be paid by such parish, township, or place, out of the fines, forfeitures, compositions, payments, and assessments authorized to be collected and raised by virtue of this Act."

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They also relied on *Lanchester v. Frewer*,[‡] and *Lanchester v. Tricker*.§

Under the direction of the learned CHIEF BARON, who referred to *Higgins v. Livingston*,|| a case heard on appeal from Scotland to the House of Lords, as a decision in favour of the demand, a verdict was taken for the plaintiff, with liberty for the defendants to move to enter a nonsuit.

[†] Former Highway Act, since repealed.

[‡] 2 Bing. 361.

§ 1 Bing. 201.

|| Considered 1 July, 1816; reported in 6 Paton, 244.—R. C.

Taddy, Serjt. having obtained a rule *nisi* accordingly,

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Bosanquet and *Wilde*, Serjts. shewed cause :

In employing the plaintiff, the surveyor acted only as agent to the defendants, and they were equally liable as if they had named him and employed him themselves. The Act of Parliament did not take away the plaintiff's common law remedy against those by whom he had been employed. But the Act itself gave him no remedy in a case like the present;

The 47th section requires that the accounts of the surveyor should be annually made up and presented *fifteen days before the special sessions held in the week after the Michaelmas sessions. The plaintiff's bill, from the duration of law proceedings, could not be made out till two or three years after he was first employed, and how could he charge successive sets of surveyors with fractional portions of an incompleted expence? The statute called on the magistrates to allow the surveyor's bill, but how could they judge of it, or allow it, without seeing the whole at once? and if they refused to allow it, as the Court of King's Bench would not grant a mandamus against the magistrates in such a case, what remedy had the plaintiff against the surveyor? The only question, therefore, was, whether or not he had been employed by the vestry, for if employed by them, every person attending was individually responsible. In *Horsley v. Bell*,† which was a bill filed against the commissioners of a certain navigation in Yorkshire, ASHHURST, J. said, "I think the defendants are personally liable; it would be hard that the plaintiff, who has done the work at a reasonable price, should have no remedy." And in *Eaton v. Bell*,‡ it was holden that commissioners of an inclosure were privately responsible to their bankers for drafts drawn in respect of the inclosure, though the drafts required the bankers to place the sums mentioned in them to the drawers' account as commissioners.

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In like manner in *Higgins v. Livingston* the commissioners of a turnpike between Edinburgh and Glasgow, were held responsible, in their private capacity, to persons employed by them

† 16 R. R. 89, n. (4 Dow, 354, n.; 1 Br. C. C. 101, n.). ‡ 5 B. & Ald. 34.

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[*482]

about the construction and repair of the road. And in *Brook v. Guest*† ABBOTT, Ch. J. held a churchwarden individually responsible to a person whom he had employed to draw plans of a church *for the inspection of the commissioners for building new churches under 58 Geo. III. c. 41.

These decisions were not adverted to in the arguments in *Lanchester v. Frewer*, and *Lanchester v. Tricker*, and those cases are distinguishable from the present on the ground that Lanchester was a churchwarden, and instead of commencing an action, might have raised a rate to indemnify himself.

Taddy, contrà :

So the surveyor in the present case was authorized under 13 Geo. III. c. 78 to raise a rate out of which he might have reimbursed himself, upon presenting annually to a vestry or a magistrate the account of the expences incurred within the year; and the plaintiff was not employed by the vestry, but by the surveyor. Even if he had been employed by the vestry, vestrymen are not individually responsible for orders given by the vestry as a collective body; the reasons for this are fully given in *Lanchester v. Frewer*. For the performance of such orders a rate is raised on the inhabitants of the parish generally, and no one would attend to the parish business at the risk of being individually responsible. The cases referred to on the other side are all cases of commissioners or churchwardens who had power to raise a fund for reimbursing themselves, and who suffered from their own neglect.

BEST, Ch. J. :

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The Court has no intention of impeaching the decisions which have been referred to by the counsel for the plaintiff, but which have nothing to do with the present case. In the cases referred to the parties voluntarily placed themselves in the responsible situation of commissioners, a situation which bears no resemblance to that of the inhabitants of a parish resorting to a vestry. Commissioners have, in almost every instance, *power to raise tolls, or to impose assessments to indemnify themselves, and they

† N. P. Stafford Summer Assizes, 1825.

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ought, therefore, to avoid entering into an undertaking until they have money in hand, or have ascertained that the tolls will cover the expence. In *Higgins v. Livingston* the parties sought to be charged were commissioners of a turnpike between Edinburgh and Glasgow, and they had the usual powers of making contracts, raising tolls, and borrowing money. In *Brook v. Guest*, and *Lanchester v. Frewer*, the party charged was a churchwarden, and might have reimbursed himself by a rate for the expence he had incurred on behalf of the parish. *Eaton v. Bell* was decided on the same principle, and it was holden that commissioners under an Inclosure Act which empowered them to make a rate to defray the expences of the enclosure, were liable to their bankers for the amount of drafts drawn in respect of the enclosure. BAYLEY, J. says, "The defendants must have known what they had collected, and what means they had of collecting more, and they ought to have taken care, before they drew drafts, that they had money to reimburse the persons who advanced money on those drafts." He puts it expressly on the ground that the defendants had the means of raising rates to reimburse themselves; and the same observation is applicable to the case of *Horsley v. Bell*. The defendants in the present case have not voluntarily engaged in any commission, nor have they any means of raising tolls to indemnify themselves.

They have merely met in a vestry, and agreed to certain resolutions; they have not, as it has been asserted, employed the plaintiff as an attorney, for the resolutions agreed to, order the surveyor to take measures for defending the indictment, and according to the 13 Geo. III. c. 78, s. 56, whatever is done in this respect must be done under the surveyor's authority; he is to carry on the proceedings, to incur the expense in the first instance, to charge it to *the parish account after it has been agreed to at a public meeting, or sanctioned by the order of a magistrate, and to be paid out of the fines, payments, and assessments raised by virtue of the Act.

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The persons who meet in vestry are only to put the surveyor in motion, and control his charges; but they enter into no personal undertaking to pay the parties employed by him. This case was depending three years. The inhabitant of a parish

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would be in a cruel situation if he were to leave the parish shortly after attending a vestry, and be liable for years to the charges of a surveyor over whom he has ceased to have any control.

The vestry clerk should have presented his bill yearly that the parish might determine from time to time whether they would sustain the expence of further proceedings, and also that every inhabitant might be assessed in his due proportion; otherwise, as I said in the case of *Lanchester v. Frewer*, a man who had but five pounds a year in the parish might be subjected to the same burthens as men who had a thousand. Therefore, the law wisely considers the resolutions of a vestry, not as the personal undertaking of each vestry man, but as merely intended to put the surveyor in motion, who is afterwards to be reimbursed by a regular rate upon the whole parish.

PARK, J.:

If the law were as the plaintiff's counsel have contended, no respectable inhabitant would attend a vestry meeting, and the business of a parish would fall into inferior hands, who would render the whole a job. It seems to me that the 58 Geo. III. c. 69,† has decided this case, and I see no difficulty in it. The resolutions of this vestry were such as the Act requires.

[*485] The surveyor is the proper person for conducting the business, and he is to charge the parish in his account. *The plaintiff had only to deliver his bill to the surveyor *de anno in annum*; the surveyor should have applied to the vestry, and if the vestry refused to make an assessment for his charges, he might resort to a justice of peace.

The cases cited are distinguishable on the ground that the parties in those cases were chiefly commissioners, who had entered upon their functions voluntarily, and were able to raise a fund for their own indemnity.

In *Brook v. Guest*, a churchwarden was holden liable for the expence of a plan of a church which he had procured for the approbation of certain commissioners for building new churches. But the churchwarden was the proper person to procure such a

† See now Local Government Act, 1894 (56 & 57 Vict. c. 73).—R. C.

plan, and he might have reimbursed himself out of the church rates. That was the ground of decision in *Lanchester v. Frewer*, and much of the reasoning in that case applies to the present. I am of opinion, therefore, that parties meeting in vestry are not personally responsible, and that the rule which has been obtained must be made absolute.

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BURROUGH, J. :

If the learned CHIEF BARON had known the course of business in parishes, he would have had no difficulty in this case. The Act of 58 Geo. III. shews how money is to be raised for parish purposes, and how applied, and the plaintiff who, as vestry clerk, must have known the course of business, might have delivered his bill by parts every year to the surveyor in office, and he would have included it in the charges of the current year, by which means the burthens would have been thrown on those who inhabited the parish at the time, and who ought to sustain it. The cases, therefore, which have been cited do not apply, because the surveyor has the credit and land of all the parish, upon which he may levy assessments distributed in just proportions ; and for this reason the surveyor himself could not have sued *the defendants, if he had paid the plaintiff ; he ought to proceed according to the directions of the Act, which are clear, and beneficial to the interests of all.

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GASELEE, J. :

The present decision will not impeach the authority of any of those which have been referred to. The defendant, and others assembled in vestry, directed the proper officer to take proper steps for resisting an indictment for the repair of a road ; they left it to the surveyor to employ an attorney : that, among other circumstances, tends to shew that they meant to incur no personal responsibility, and there is not a pretence for saying that they undertook individually to pay the plaintiff.

Rule absolute.

1826.
May 5.

[492]

HOLROYD v. DONCASTER.

(3 Bing. 492—493; S. C. 11 Moore, 440; 4 L. J. C. P. 178.)

A party who sues another for arresting him on an illegal warrant is not bound to produce the warrant.

THIS was an action of trespass for false imprisonment, tried before Bayley, J. last York Assizes. The declaration was in the usual form. A constable who had made the arrest of which the plaintiff complained, stated that he had arrested plaintiff under a warrant which he received from another person, and that when about to execute it, the defendant desired him to make haste. It was also proved, that the defendant had admitted in conversation that he had sent the plaintiff to prison. But no warrant was produced in evidence. The plaintiff's counsel, however, having opened the case as an arrest upon an illegal warrant, it was objected on the part of the defendant, that the plaintiff ought to produce the warrant.

A verdict was taken for the plaintiff, with liberty for the defendant to move to enter a nonsuit, if the Court should be of opinion that the plaintiff ought to have produced the warrant.

Wilde, Serjt. accordingly moved for a rule to this effect, on the ground that the plaintiff ought to have produced the warrant which was the cause of his action; also, that it sufficiently appeared from the defendant's admission, that the plaintiff had been apprehended under a warrant, and that, therefore, the action ought to have been conceived in case and not in trespass: *Morgan v. Hughes*,† *Stonehouse v. Elliott*.‡

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A rule *nisi* was granted, and *Wilde* was this day heard in support of it. But

The Court were clearly of opinion that the warrant not having been produced, there was no legitimate evidence on which it could be presumed that it had ever issued, or that the action

† 2 T. R. 225.

‡ 3 R. R. 183 (6 T. R. 315).

ought, in consequence, to have been case ; and that, with respect to the production of the warrant, it was equally clear that a party who took upon himself to imprison another was *primâ facie* guilty of a trespass, the onus of justifying which rested entirely with himself.

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Rule discharged.

C. P. HILARY TERM.

BUCKWORTH *v.* THIRKEL.

1785.
K. B.
TRINITY
TERM.

(10 Moore, 235, n., 238, n.; S. C. 3 Bos. & P. 652, n.; 4 Doug. 323.)

[The following note of this case is given by Moore as a note made by Mr. Justice BURROUGH. It appears to be the most authentic record of a decision of Lord MANSFIELD on a rare, though not obsolete, point of real property law.—R. C.]

THIS was an action of replevin. The defendant made cognizance, under Solomon Hanford, who claimed to be tenant by curtesy. A special case was reserved, stating a devise to T. C. and E. P., their heirs and assigns, for ever: upon trust that they receive the rents, and apply the same to the use, maintenance and education, &c. of the testator's god-daughter, Mary Barrs, till she arrive at the age of twenty-one years, or be married; and from and after, &c., he gave and devised all, &c. unto the said Mary Barrs, her heirs and assigns for ever; but in case the said Mary Barrs should happen to die before she attained the age of twenty-one, and without issue, &c., then, from and after the decease of the said Mary Barrs without issue as aforesaid, he gave and devised all, &c. unto his grandson, Walter Barrs, and to his assigns for life, with divers remainders over. In March, 1781, Mary Barrs being then nineteen, intermarried with Solomon Hanford. In March, 1782, a child was born, which died, August 25th, 1782; and on the 28th, the mother died, under twenty-one, and without leaving issue. Solomon Hanford, the husband, after the marriage, and during the coverture, received the rents and profits of the premises.

This case was twice argued, first, in Easter Term last, by *Mr. Wood* and *Mr. Whitchurch*; and now, by *Mr. Le Blanc* and *Mr. Wilson*.

At the beginning of the second argument, it was stated, that, since the last argument, another fact was agreed to be added to the case: viz. "That Walter Barrs, the devisee over, was, and now is, the sole heir-at-law."

Mr. Le Blanc, for the plaintiff, now contended, that the wife should be seised of an indefeasible unqualified estate to entitle the husband to curtesy. *The words, "without leaving issue," mean issue living at the death of Mary Barrs. In the event of her dying before twenty-one, not leaving issue living at her death, it is not a limitation spent or expired naturally, but is defeated by a condition. On the former argument two cases were cited to support the distinction between estates expired and estates defeated. The first of them, *Payne v. Sammes*, (Goldsb. 81, 1 Lev. 167, 1 And. 184, 8 Co. Rep. 34). The principle I contend for, is laid down in both those cases. *Payne v. Sammes* was a case where a mother, seised, and having two daughters, covenanted to stand seised to the use of the eldest, E., in tail, on condition that she should pay to her other daughter, within a year after the death of the mother, or within a year after the other daughter should come to the age of eighteen years, 300*l.* and if E. should fail in payment, or die without issue, before the payment, then to the use of the second in tail. The mother died; E. married, had issue, and afterwards died without issue, before the day of payment. There the Court held E.'s husband entitled to be tenant by curtesy, and said: for as to the condition of payment of the sum, the case is not determined, for she died without issue, before the day of payment, (i.e.) before the second daughter came of the age of eighteen years, and as to that there is no condition broken, &c. Here, if there were no limitation over, it would be a fee determinable on condition. The condition here is broken.

The case of *Boothby v. Vernon*, (9 Mod. 147), was also mentioned. Rules relative to dower and curtesy are analogous, as to seisin, (1 Ro. Abr. tit. Dower, (F 1), 676, 1 Vent. 327, Co. Litt. ss. 52, 53). It is necessary that the issue should inherit as heirs to the wife, and the same estate the wife had. Here, this would not be so, for the heirs would have an absolute estate, the wife a conditional one. Before the statute De Donis, estates tail were fee simple conditional. It was held before, that it became absolute on the birth of a child. Then it was said that the tenant was seised in fee simple absolutely for three purposes: first, to enable him to alien; secondly, to make it liable to

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[236, n.]

BUCKWORTH ^{v.} THIRKEL. forfeiture for treason or felony; thirdly, it descended to the issue of a second marriage and so it would make a husband of such issue tenant by the curtesy. Then he stated the statute De Donis, and cited 2 Inst. 333, and 8 Co. Rep. 35 b, 36 a. This case stands as before the statute De Donis; the reason why the husband is tenant by the curtesy in cases of tenant in fee simple absolute, and fee tail, answers their arguments, and shews there is no good sense, in the distinction between limitation in tail, and a condition in tail. Bro. Abr. 296, "Estate," pl. 71; Fitz. 339 b, "Foremedon," pl. 56; Plowd. 241. Here the estate never became absolute. Had Mary Barrs lived till twenty-one, it would have been absolute. In this case it was defeated by a condition.

[237, n.]

Mr. Wilson, for the defendant :

I admit Mary Barrs took a fee simple, subject to be made an end of by an event which has happened. The sole question here is, if she was seised of a sufficient estate. Tenancy by the curtesy is by operation of law, wherein the issue may by possibility inherit. The husband in the wife's life was liable to the services. The husband's right was inchoate on the birth of a child, and becomes complete on the vesting of the subsequent estate, though the wife's estate be gone, and the executory devise defeated. The executory limitation over would have been void at the time of the statute De Donis. To give effect to men's intentions, first in Chancery, then in law, these limitations have been permitted. It was never meant by the statute to deprive the estate of any of its known properties. The estate by curtesy is not necessarily part of the wife's estate. She may be tenant in tail; and there the estate arises out of the reversion. The case of dower is analogous to this. The reason in Ro. Ab. 676, is a false one; besides, the Judges were divided. As to the case in Goldsb. it seems from it, that if it had appeared that the condition had not been performed, they would have held the tenancy by the curtesy. The dictum in *Payne v. Sammes* was extra-judicial, and there seems to have been a difference taken, between a condition of which the heir was to take advantage by entry, which put an end to all mesne charges, and related to the

creation of the estate, and a conditional limitation which related only to the defeasance. Lord ANDERSON reasoning in another part of Goldsb. has an eye to the same idea ; and see what he says also in 1 Lev. 169. The determination of the wife's estate is no answer to the claim of curtesy. The statute De Donis has not taken it away, but the existence of it before, shews tenancy by curtesy in case of a conditional estate, at common law.

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This case is a fee simple conditional, liable to the incidents, as the case of fee tail, before the statute. *Boothby v. Vernon* applies not, for the wife was never seised in possession of an estate of inheritance. The estate there was in the son by purchase. The same answer may be given to the case of joint tenants, for the first never had the inheritance; forfeiture for felony would not defeat the estate by curtesy : 29 Edw. III. 27.

LORD MANSFIELD :

The right of a tenant by the curtesy existed before the statute De Donis. It was part of the common law. The definition necessary to entitle the husband is, that the wife should be seised of an estate of inheritance, which by possibility might descend to her issue, and that a child should be born. Estates of inheritance at the common law were absolute or conditional. Tenancy by the curtesy went to both ; and this, though the wife died without issue living, so as to let in the reverter. By a subtlety, and in odium of perpetuities, it was held, *for a special purpose, that a tenant in tail might alien on the birth of issue.

[*238, n.]

At the common law, the only modification of estates expressly limited was by way of condition. The Statute of Uses introduced a greater latitude. There then arose a great dread of letting in perpetuities. About the time of Queen Elizabeth, and King James I., many cases arose ; contingent remainders were held to be destroyed before the remainder-man came *in esse* . the Court leant against all contingencies over : having gone a great way, it was thought they had gone too far ; then came new devices. During the troubles, the most eminent men in the profession were chamber counsel ; then arose trustees to preserve contingent remainders and executory devises. It is not long since the boundaries of the last were settled : I remember when

BUCKWORTH ^{v.} THIRKEL. it was settled that an executory devise should be good on a devise for a life or lives in being, and twenty-one years after. Now here it is said, it is a conditional limitation. It is not so; it is a contingent limitation; if so, then it does not defeat the right; it is a limitation over, which defeats the estate on her death under twenty-one, and without issue. But during the time of her living she was seised of a fee simple estate, and her issue would have taken. So the defendant is entitled to be tenant by the curtesy.

Judgment for the defendant.

1825.
April 21.
[249]

TRIGGS, ADMINISTRATRIX OF TRIGGS *v.* NEWNHAM.

(10 Moore, 249—251; S. C. 3 L. J. C. P. 119; S. C. at Nisi Prius,
1 Carr. & P. 631.)

Presentment of a bill of exchange, at the house of a trader, or merchant, between eight and nine in the evening: Held, sufficient.†

THIS was an action on a bill of exchange, for 39*l.* 16*s.*, drawn by the intestate, (the plaintiff's late husband,) a publican in Sussex, in the year 1815, upon the defendant, who accepted it, payable at C. B. Cockerell's, No. 11, Nassau Street, Soho. The defendant pleaded the Statute of Limitations.

At the trial, before Best, Ch. J. at Westminster, at the sittings after the last Term, it appeared that the bill was presented at Nassau Street for payment, by a notary, between eight and nine o'clock in the evening of the day on which it became due; and the plaintiff gave in evidence a letter written by the defendant, dated the 17th February, 1821, acknowledging his liability; and that he subsequently promised to pay the amount of the bill. The jury found a verdict for the plaintiff.

Taddy, Serjt. now applied for a rule *nisi*, that this verdict might be set aside, and a new trial granted, and submitted, that the bill should have been presented for payment within the usual hours of business, and that between eight and nine in the

† See Bills of Exchange Act, 1882, s. 45 (3). The expression there is "at a reasonable hour."—R. C.

evening was, at all events, *too late. In *Parker v. Gordon*,† the drawee accepted a bill, payable at his banker's, who shut up at six o'clock in the evening, and the bill was not presented for payment until after that hour, when the shop was shut up, and the clerks gone: in an action against the drawer, it was held, that this was not a good presentment. In *Elford v. Teed*,‡ it was held, that a presentment of a bill, at a banking-house, after banking hours, when the house is shut, viz., between half-past six and seven in the evening, is not a sufficient presentment to charge the drawer. And in *Callaghan v. Aylett*,§ it was decided, that if a bill be accepted, payable at a banker's, the neglect to present it there is equally a discharge to the acceptor as to the drawer. In *Elford v. Teed*, Lord ELLENBOROUGH said, "there is not any text-writer, upon whose authority, a presentment of a bill, by a notary, at a house of business, after it was closed, could be sustained. It is laid down, in Marius,|| that it must be made during times of business, at such seasonable hours as a man is bound to attend, by analogy to the *horæ juridicæ* of the Courts of Justice."

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[*250]

BEST, Ch. J. :

In *Parker v. Gordon*, and *Elford v. Teed*, the bills were accepted payable at a banker's, who begin and leave off business at stated hours, and it was held that the presentment, in such cases, must be made within the limited and usual banking hours; for that, if a party took an acceptance, payable at a banker's, he bound himself to present the bill during the banking hours. For the convenience of bankers, and in order to provide for the clearances, it is necessary for them to close at five or six o'clock. In *Leftly v. Mills*,¶ Lord KENYON thought *that the acceptor of a bill had till the last moment of the day of grace, to pay the bill; and BULLER, J. thought it was payable any time upon the last day of grace, upon demand, so as such demand was made within reasonable hours; and here the demand was made at the house of a private individual. The case of *Barclay v. Bailey*,†† appears to be precisely in point, where Lord ELLENBOROUGH held, that

[*251]

† 8 B. R. 646 (7 East, 385).

change] 2nd edit. 187.

‡ 1 M. & S. 28.

¶ 2 B. R. 350 (4 T. R. 170).

§ 3 Taunt. 397.

†† 11 B. R. 787 (2 Camp. 527).

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the presentment of a bill for payment, at the house of a merchant residing in London, at eight o'clock in the evening of the day it becomes due, was sufficient to charge the drawer ; and, if sufficient to charge him, of course it is so as against the acceptor : and his Lordship there said, " a common trader is different from bankers, and has not any peculiar hours for paying or receiving money. If the presentment had been during the hours of rest, it would have been altogether unavailing ; but eight in the evening cannot be considered an unseasonable hour for demanding payment, at the house of a private merchant, who has accepted a bill."

The rest of the COURT concurring,

Rule refused.

C. P. MICHAELMAS TERM.

M'ALLEN v. CHURCHILL.

(11 Moore, 483—484 ; S. C. 4 L. J. C. P. 183.)

1826.
May 30.

[483]

In assumpsit for the breach of an agreement, a clause contained therein, although illegal, as being in restraint of trade, if it form no part of the consideration, need not be set out in the declaration.

THIS was an action of assumpsit for the breach of an agreement. The declaration stated, that, by an agreement between the plaintiff and defendant, the latter agreed to assign his interest in a lease of a public-house, to the former, for the term of thirty-one years, at the yearly rent of 100*l.* ; that the plaintiff was to pay all taxes, and repair the premises, and take the fixtures and stock in trade at a valuation ; and that the defendant was to pay all arrears of taxes up to the date of the agreement ; that the plaintiff agreed to purchase the defendant's interest in the lease, and pay for the fixtures on these terms ; and that he deposited 300*l.* in part of the purchase-money. The declaration then averred mutual promises. Breach—that the defendant had no right to assign the lease in question, nor had

he any title to the premises agreed to be assigned, before or after the agreement was entered into. The defendant pleaded the general issue. M'ALLEN
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At the trial, before Best, Ch. J. at Guildhall, at the sittings after the last Term, it appeared on the face of the agreement, that it contained a clause, (not set out in the declaration), whereby the defendant agreed, that he would not, directly or indirectly, take, occupy, or carry on the business of a publican or victualler within five years from the time of making the agreement. The jury found a verdict for the plaintiff, on the ground that the defendant had no right or title to assign the premises.

Vaughan, Serjt. now applied for a rule *nisi* that this verdict might be set aside and a new trial granted, or a nonsuit entered, on the ground that the whole of the consideration had not been set out in the declaration; and that the clause omitted, being an essential part of the consideration *for which the house was to be assigned to the plaintiff, it vitiated the whole agreement, inasmuch as it was in general restraint of trade, and therefore illegal. In a note by Mr. Serjeant Williams to *Hunlocke v. Blacklowe*,† it is said, that “a bond, covenant, or promise, even on good consideration, not to use a trade any where in England, is void, as being too general a restraint of trade; and that, where the restraint is general, the contract is void, being of no benefit to either party, and only oppressive;” and here, the stipulation imposed on the defendant is in general terms, and therefore void. But the entire consideration must be stated in the declaration, and the clause in question is a substantial part of the consideration. [*484]

BEST, Ch. J. :

This objection as to the clause forming part of the consideration was not raised at the trial. It was merely contended that as the clause restrained the defendant from carrying on a business any where, it was illegal. The question of variance between the agreement and the declaration was not raised. But are we

† 2 Wms. Saund. 156, n. 1.

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CHURCHILL. to say that every agreement is wholly bad, because it may happen to contain an illegal clause? In setting out a contract in a declaration of assumpsit, it is only necessary to state so much of it as contains the entire consideration for the act, and the entire act which is to be done in virtue of such consideration,† and it appears to me, that the consideration in this case was sufficiently stated: the clause in question is a superadded or independent clause; it is a sort of rider, forming no essential part of the consideration. I therefore think that there is no ground to disturb the verdict.

The rest of the Court concurring,

Rule refused.

† See *Clarke v. Gray*, 6 East, 564.

EXCH. HILARY TERM.

EX PARTE JONATHAN PELLOW.

(McClelland, 111—112; S. C. 13 Price, 299.)

The statutes 3 Geo. IV. c. 46, and 4 Geo. IV. c. 37, do not oust this Court of its jurisdiction, where forfeited recognizances have been actually estreated into it from an inferior jurisdiction.

DOWLING, on the last day of Term, moved to discharge the recognizance of this person, which had been estreated in a matter of bastardy, into this Court, from the Borough Sessions of Okehampton in Devonshire, since the passing of the statutes 3 Geo. IV. c. 46, and 4 Geo. IV. c. 37.† He produced the documents usually entitling the party to relief; but

† The first of these is intituled, "An Act for the more speedy return and levying of fines, penalties and forfeitures, and recognizances estreated." The preamble recites, that great delays occurred in the return of fines, issues, amerciaments, forfeited recognizances, sum or sums of money, paid or to be paid, in lieu or satisfaction of them, or any of them, by or before any justice of the peace, or at any general or quarter sessions of the peace, in that part of the United Kingdom called England; and that it is expedient that further provision should be made for the speedy and regular return of all such fines, &c.; the first section‡ therefore repeals, among other enactments, so much of the statutes 22 & 23 Car. II. c. 22, and 4 & 5 W. & M., as relates to fines, issues, and amerciaments, forfeited recognizances, sum or sums of money, paid or to be paid, in lieu or satisfaction of them or any of them, imposed and adjudged at any quarter sessions of the peace. And the second section enacts, that from the 29th

of September, 1823, all fines, issues, and amerciaments, forfeited recognizances, sum or sums of money, paid or to be paid, in lieu or satisfaction of them or any of them (except as therein excepted,) to be imposed by any justice of the peace in England, shall be certified by such justice to the clerk of the peace, or town clerk, on or before the ensuing general or quarter sessions. And such clerk of the peace, or town clerk, shall copy on a roll, such fines, &c. together with all fines, &c. imposed or forfeited at such court of general or quarter sessions; and shall, within a time to be fixed by the Court, not exceeding twenty days from the adjournment of such court, send a copy of such roll, with a writ of *distringas* and *capias*, or *feri facias* and *capias*, to the sheriff, or other officer, which shall be the authority to them for proceeding to the immediate levying of such fines, &c.; or for taking into custody the bodies of such persons, in case sufficient goods and chattels shall not be found. The fifth section allows the

‡ This section is (*pro formâ*) repealed by S. L. R. Act, 1873. But this, of course, does not affect any repeal effected by that section.—R. C.

1824.

Feb. 28.

Exchequer
Chamber.ALEXANDER,
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The Court then suggested a doubt, whether, since the passing of the Acts mentioned, their jurisdiction in matters of this nature was not completely taken away, being inclined to think that the party could only be relieved by applying to the justices in Sessions. They, therefore, for the present, refused the motion; but said that the application might be renewed, if the party should be so advised.

Dowling, on this day renewed the application, and said, that after looking with attention to the statutes in question, he could find nothing contained in either, which took away the jurisdiction of the Court. He submitted, that in this case it was quite clear the Court had jurisdiction, because the recognizance had been in fact estreated into it, and consequently the party had no other remedy but this application, in order to prevent the issuing of process.

The Court, under the circumstances stated, granted the motion, and

Ordered the recognizance to be discharged.

party an appeal to the next sessions, on giving security to the sheriff. By the sixth, the Court of Sessions is authorised and required to enquire into the circumstances of the case; and at its discretion empowered to order the discharge of the whole of the forfeited recognizance, or sum of money paid, or to be paid in lieu and satisfaction thereof, or any part thereof. The eighth section enacts, that the sheriff or other officer shall return the writ on the first day of the ensuing sessions, and shall state on the back of the roll what shall have been done in the execution of such process, which return, together with a duplicate of the roll of fines,

&c., at the preceding quarter sessions, and the certificate of the Court on the back of the roll, stating that due diligence had been exercised on the part of the sheriff, shall be transmitted by the clerk of the peace to the Lords Commissioners of the Treasury. The fourteenth section provides, that all clerks of the peace, &c. shall yearly deliver into the Court of Exchequer a duplicate of all such fines, &c. as shall be contained in the several rolls or copies, which shall have been sent out to the sheriffs for the purpose of levying, and which shall have been set, &c. in any sessions held before Michaelmas in each year.

EXCH. EASTER TERM.

ARCHDEACON AND OTHERS *v.* BOWES AND OTHERS.

(McClelland, 149—168; S. C. 13 Price, 353.)†

1824.

*April 27, 28.**Exchequer
Chamber.**May 11.**Gray's Inn
Hall.*

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A mortgagee let into possession by the mortgagor, till he should be paid the sum lent and interest, overpaid in two, and holding over thirty-four years longer, charged with the balance, and interest from the date of a notice to pay the receipts to a prior mortgagee.

Only 4 per cent. interest allowed, though the overpaid mortgagee had purchased two small shares of a prior mortgage on the same estate which had been paid off with interest at 5 per cent.

A mortgagee in possession held entitled to costs incurred by him in that character, but charged with the costs of subsequent proceedings, rendered necessary by his conduct when overpaid.

IN 1770, Andrew Robinson Bowes (since deceased) mortgaged an estate called Benwell in Northumberland, to B. Randall and J. J. Harvey, for securing 12,500*l.* and interest. By indentures of lease and release, bearing date 17th and 18th April, 1772, and 28rd October, 1775, he mortgaged the same estate for 4,400*l.* and interest, to Aubone Surtees (since deceased) in trust, for the benefit of nine of the children of William Archdeacon (since deceased) in equal shares. This was known by the name of the Archdeacon mortgage.

In 1783, the estate was mortgaged to Joseph Lamb for 1,684*l.* and interest.

In 1784, the same premises were conveyed by mortgage securities to William Gibson for 7,500*l.*; in respect of 2,583*l.* 19*s.* 9*d.* of which, (being the balance of the mortgage debt to Randall and Harvey, which was then paid off,) he became the first incumbrancer; and in respect of 4,916*l.* 0*s.* 3*d.*, the residue, the fourth.

In April, 1786, a fifth mortgage of the same estate was made to John Wright, a late defendant, for 1,200*l.*, and interest at 5 per cent. The mortgage deed contained a special covenant for entry and possession, with power for the mortgagee, his executors, &c. to receive the rents and profits "until he or they should be fully paid and reimbursed the said sum of 1,200*l.* and interest that should become due and payable in respect thereof."

† *Ashworth v. Lord* (1887) 36 Ch. D. 545.

ARCHDEACON ^{v.} BOWES. And the mortgagor also agreed to allow the mortgagee, his executors, &c. all such costs, charges, and expences, as he or they might be put to, by reason of their lawfully acting under any of the powers given by the said indenture. J. W. entered into the possession, and the receipt of the rents and profits of

[*150] *the greater part of the premises demised by the indenture; and received from twelve of the tenants the half year's rent due from them at Lady Day then last. In February, 1794, a sixth mortgage of the Benwell estate was executed to Thomas Bowes (since deceased), a late defendant, to secure a sum of 2,895*l.* 15*s.* 1*d.*, for which a judgment had been obtained by him against the mortgagor, with interest at 4 per cent. And in the same year, it was mortgaged for the seventh and last time to Hannah Gibson, then the first and fourth incumbrancer, for 5,983*l.* and interest. In 1789, notice had been given by Mrs. Gibson, the first mortgagee, to J. W. (who was tenant of a small part of the mortgaged estate), with the other tenants, to pay rents to her, which he refused to do. In May, 1790, J. W. purchased one-ninth share of the Archdeacon mortgage, and all arrears of interest, from one of the children entitled to it, for a consideration of 450*l.*; and in April, 1792, another ninth share, from another child, for a like consideration. In 1794, T. Bowes, the sixth mortgagee, wrote and sent a letter to Wright in the following terms:

“SIR,—The situation of Mr. Bowes's affairs is such, that unless some speedy measures are adopted, the interest of money will eat out the principal. Your want of inclination to assist in bringing matters to an amicable determination, obliges me to trouble you on the present occasion, and to acquaint you, that as Mr. Bowes has (in addition to my judgment, which you were long since well acquainted with,) by indenture of assignment, bearing date the 17th day of February last, demised to me his estate at Benwell, for securing the sum of 2,895*l.* 15*s.* 1*d.* and interest; I request that you will immediately pay the receipts and produce of such part of Benwell as have come to your hands (since the notice that was some years since given you by Mr. Robert Pearson as agent to Mrs. Hannah Gibson) to the

[*151] said Mrs. Gibson, as first mortgagee *on the Benwell estate,

in aid of the subsequent incumbrancers : and in default thereof, I beg leave to inform you, that I shall insist on your making annual rests, and accounting for interest for every shilling received, or to be received by you from the Benwell estate, since you received such notice ; and I also inform you, that I shall resist the allowance to you of any payments whatsoever, which may be stated by you in your accounts, as made to yourself, or any person or persons whomsoever, other than the said Mrs. H. Gibson. I am sorry that you oblige me to give you this notice. I am, Sir, &c.

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“October 21st, 1794. (Signed) “THOMAS BOWES.”

“P.S. You will please to keep this letter.

“To Mr. JOHN WRIGHT.”

In May, 1795, the bill in this cause was filed by W. C. Archdeacon and others entitled to three ninth shares of the Archdeacon mortgage, for redemption or foreclosure, against A. R. Bowes, the mortgagor ; Mrs. Gibson, as first, fourth, and seventh mortgagee ; J. Lamb, as third mortgagee ; J. Wright, as fifth mortgagee, and purchaser of two ninth shares ; and the parties entitled to the remaining four ninth shares of the Archdeacon mortgage. J. W. put in an answer, whereby he said, that having previously acted as his attorney or agent, the mortgagor employed him in the year 1786 to receive some of his Benwell rents, at the usual poundage ; and that he accordingly received the rents from several of the tenants, and accounted for them to him, till the notice given by Mrs. G. in 1789 ; from which time the tenants paid him no more rent, except one, who continued to pay him a yearly rent of 25*l.* for a house not, as he believed, comprised in her mortgage. He admitted, that he received notice himself, as tenant of a field, to pay no more rent to the mortgagor, but to pay in future to Mrs. G. ; and that “considering himself as a mortgagee in possession,” he refused to pay it to her, and had ever since given credit for it *in his account with the mortgagor. He believed, that Mrs. G. had, since the time of the notice, received the rents of all the premises comprised in the mortgage, except the said field, the mansion house, gardens, plantations, and parks, two free-stone quarries,

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ARCHDEACON^{v.} and a cottage-house, which were not let to any tenant since the year 1786. The answer further stated, that the crop of the Parks was annually sold, or otherwise disposed of as circumstances required, and the money arising from the produce accounted for by the defendant to A. R. B., until he was informed that one or more executions were issued against the said A. R. B.; on which he thought it would be prudent to prevent, so far as he legally might, any other creditor from taking the produce in preference to himself, who was both a mortgagee, and a bond and simple contract creditor to a great amount, and therefore he resolved to take possession of the said Park as a mortgagee, and to apply the rent thereof solely in discharge of the principal and interest due on his mortgage; and that accordingly, in the year 1794, he, in his own name, cut the crop of hay then growing on the park, and took away, and converted part thereof to his own use; that in the (then) present year, he sold the crop growing on the Park, and the after eatage, for 161*l.*; that he had received various sums of money as rent for the quarries and cottage, but had given credit for them in his account; and that he had frequently applied to the mortgagor to join in some proper and reasonable plan for the sale of the premises. In 1796, on the motion of the plaintiffs, which was opposed by J. W., a receiver was appointed of all the premises not in the possession of the first mortgagee.† Subsequently to this, in consequence of the number of parties, the suit became several times abated, and four bills of revivor and supplement were filed previous to the original decree. The cause *came to a hearing in 1801, and a decree was made referring it to the Deputy Remembrancer to make the usual enquiries as to the several mortgages, and to state their respective priorities; and to take an account of the rents and profits of the mortgaged premises received by defendant J. W., and to state in what capacity he received the same. In pursuance of the decree, interrogatories were allowed for the examination of defendant J. W.; but he put in no answer to them, nor did he produce any deeds, books, or papers, though required to do so. But two charges

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† *Vide* 4 R. R. 855 (3 Anst. 752), where this proceeding in the cause is reported.

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left by the plaintiffs' late solicitor were attended upon by his solicitor. The Deputy Remembrancer made his report on the 16th March, 1803; and after stating the amounts and priorities of the mortgages respectively, and that the first had been paid off in Nov., 1794, he found "that defendant J. W. had received for net rents and profits of the mortgaged premises 1,340*l.* 14*s.* 2*d.*: and that he had received the same as mortgagee." In December, 1804, the cause being heard for further directions on the report, a decree was made for redemption or foreclosure of the several mortgagees in succession, and finally of the mortgagor, with the usual directions for taking the accounts on each mortgage in the event of redeeming the prior mortgages, &c. &c.; and directing that the Deputy Remembrancer should take an account of the rents and profits of the mortgaged premises received by said defendant J. W. unaccounted for in his said report, and also an account of the principal and interest on the aforesaid mortgage, and make annual rests therein. J. W. died in 1806, having by his will appointed his son William Wright sole executor. In 1807, a bill of revivor and supplement was filed by the assignees of Peter Archdeacon (deceased), who had become a bankrupt; to which W. W. put in an answer, whereby, as executor of J. W., he claimed to be entitled to the principal sum of 1,200*l.* and interest, as a mortgagee of the estate in the bill mentioned. In the year 1814 the executors of Lamb, the third mortgagee, *were foreclosed absolutely. In April, 1815, Robert Pearson, executor of Mrs. Gibson, paid into Court, as fourth mortgagee, the total balance due in respect of the Archdeacon mortgage, out of which the plaintiffs were paid what was due to them in respect of their shares. Several other abatements and revivals of the suit had taken place from the year 1808 to 1815 inclusive, and decrees and orders had been from time to time made for carrying on the accounts and enquiries. In February, 1817, a sum of 5,125*l.* 12*s.* 10*d.* Consols, was transferred to W. Wright, in discharge of his two ninth shares of the Archdeacon mortgage; and in the ensuing November, he, as fifth mortgagee, obtained an order to enlarge the time for his redeeming the fourth mortgagee. By a general order of transfer, of the 3rd November,

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ARCHDEACON 1820, the cause was transferred to Master Spranger. The
 r.
 BOWES. account directed by the decree of 1804, of rents unaccounted for by the late J. W., not having been carried on by defendant W. W., who as fifth mortgagee ought to have prosecuted the decree, the enquiry was prosecuted in Hilary Term, 1822, by defendant, T. Bowes, the sole executor of Dorothy Bowes, a late defendant, the sole executrix of the late defendant T. Bowes, the sixth mortgagee.

[*155] The Master made his first report in May, 1822; and after detailing various proceedings in the cause, he found that under a decree in the Court of Chancery, of August, 1810, in another suit (*Burke and others v. Jones and others*.) instituted for establishing the will of the mortgagor, the mortgaged estate had been sold; and that by another order in the same cause in August, 1817, the sum due to Pearson as assignee of the second, and as fourth and seventh mortgagee, had been paid off, with consent of the third, fifth, and sixth mortgagees, and of the trustees, and parties interested under the will of the mortgagor, and of his heiress-at-law; and that there were then standing in Court in trust in this cause, different sums, which were applicable in *the first place towards payment of the principal, interest, and costs then remaining due on the several incumbrances mentioned in the decree of 1804. And after taking the accounts directed by that decree, he found that the late defendant J. W. previous to the 16th March, 1803, had received for net rents and profits of the mortgaged premises the sum of 4,701*l.* 6*s.* 8*d.*;—that the balance due on his mortgage on the 21st April, 1787, was only 380*l.* 14*s.*; that the principal and interest due in respect thereof had been fully discharged on the 21st April, 1788; and that there remained in his hands on that day, after discharging the whole of the principal and interest, the sum of 458*l.* 0*s.* 4*d.* And he found, that the balance due in March, 1803, after deducting certain payments allowed him, and his taxed costs of this suit, amounted to 3,308*l.* 4*s.* 5*d.* The report further stated, that the sum of 6,296*l.* 14*s.* 9*d.* was the amount of principal, interest, and costs, due on the late defendant T. Bowes's mortgage security. By a decree of the 23rd May, the report of the 9th May was confirmed; and it was ordered

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that the defendant W. W. should deliver up to the solicitor for T. Bowes, all deeds, &c. in his custody or power relating to the mortgaged premises; and it was referred back to the master to enquire at what time the said late defendant J. W. had notice of T. B.'s mortgage, and to take an account of what part of the rents and profits had been received previously to such notice, and what part subsequently; and also an account of the rents and profits received by the said late J. W. subsequently to the 16th day of March, 1803, and to make annual rests from the time of the notice. And the Court declared, that what should be found due from the said late J. W., ought to be made good out of his estate; and unless the defendant W. W. should admit assets sufficient to pay what should be so found due, the Master was to take the usual accounts of the personal estate of his testator. The Master *was also directed to take an account of the rents and profits received by the defendant W. W. since the decease of his testator, and in taking it to make annual rests. And it was ordered, that the said defendant should pay into the bank, in trust in this cause, what should be found due from him on taking the said last mentioned account. And all further directions, and the costs of this suit not thereinbefore directed to be paid, and also the question of interest on the balances from time to time in the hands of the said late defendant J. W., and of the said defendant W. W., were reserved until after the said Master should have made his report.

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In pursuance of this decree the Master made his second general report on the 5th November, 1822, whereby he found that the portion of the rents and profits received previously to the notice of October, 1794, was 4,625*l.* 3*s.* 9*d.*, and, after deducting various allowances therein particularised, part of which had not been made by him before, that the sum of 1,618*l.* 8*s.* 9*d.* was the balance due in respect of the rents and profits received previously to the notice; and the sum of 509*l.* 8*s.* 4*d.* the balance due in respect of the rents and profits received subsequently, amounting together to the sum of 2,127*l.* 17*s.* 1*d.*; and that W. W. having admitted assets, he had not proceeded to take the account of the personal estate of his testator. And he found the sum of 253*l.* 1*s.* 6*d.* to be the

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balance due from the defendant W. W., in respect of the rents and profits received by him. W. W. paid the sum last mentioned into the bank, in trust in the cause. The funds in Court in this cause were carried over to the credit of another cause, wherein T. B. was a defendant; but there was a balance left of principal and interest remaining due on the sixth mortgage. The cause was in consequence set down for further directions on the last report, at the instance of defendant T. B., and heard before the late Lord Chief Baron on the 14th and 18th November, 1822; but no judgment *having been given by his Lordship, it was set down, and came on again for hearing this day. The following were the only directions on which any question was raised.

A reference back to the Master to compute interest on the balance of 1,618*l.* 8*s.* 9*d.*, from the 21st October, 1794 (the date of the notice) to the time of payment into Court, at the rate of 5 per cent. per annum.

A similar reference to compute interest, on the annual balances reported due from the said late defendant J. W., subsequently to the notice, at the like rate.

A declaration that what shall be found due for such interest ought to be made good out of the estate of the said late defendant J. W.

A reference to compute interest on the annual balances reported due from defendant W. W., at the like rate.

A reference to tax the subsequent costs of the defendant T. Bowes of the enquiries, and of taking the accounts of the balances and rents due from the said late defendant J. W., and the said defendant W. W., directed by the decree of 23rd May, 1822; and also the costs of hearing this cause for further directions, and of carrying the order now prayed for into effect.

Martin, H., and Glyn, for the defendant Thomas Bowes, representative of the sixth mortgagee.

Sclater for the defendant S. N. Meredith, acting executor of the late defendant A. R. Bowes, the mortgagor, deceased, and other persons in the same interest with the defendant T. B.

Pitt for the defendant Mary Bowes, the heiress-at-law and residuary legatee of the mortgagor, also in the same interest. ARCHDEACON
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* * * * *

Roupell, for the defendant W. Wright, the executor of J. Wright, the fifth mortgagee. * * * [159]

Martin, H., in reply. * * * [163]

Sclater and *Pitt* applied for the costs of the parties for whom they appeared respectively. [164]

His Lordship now gave judgment :

*Exchequer
Chamber.
May 11.*

ALEXANDER, C. B :

In this cause the first direction, that the Master's report may be confirmed, is quite of course. The second must be granted also ; there is no doubt but Mr. Wright, the executor, must pay into Court the principal and interest which is reported to have been due by his testator. The third is the one which introduces almost all the present questions into the cause. The first of those is, whether any interest at all shall be paid on the balance found due by the late Mr. Wright, at the time he received notice of Mr. Thomas Bowes's mortgage security, and on the annual balances of rents and profits received subsequently. The second, if the Court determines interest to be payable, is, at what rate it shall be paid. (His Lordship then stated the leading facts of the case, and read the notice given by T. Bowes to J. Wright in 1794.†) In defiance *of the notice, and without any pretence of justice, this gentleman, Mr. Wright, not only kept the money which he then had in his hands, but continued to receive the rents ; and his representative actually has in his hands this day the principal sum which he is called on to bring into Court. The first question is, whether he is to pay interest on this. Now upon that subject I have no doubt whatever. *Quarrell v. Beckford*‡ disposes of it ; and it is impossible to withstand its authority. I think this a stronger case. There, there was a

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† *Vide ante*, p. 686.

‡ 16 R. R. 214 (1 Madd. 269).

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decree of foreclosure that might have warranted the defendant in supposing he had a right to the possession. Here, there was no pretence or colour whatever for continuing to receive the rents and profits, and to retain them till the present. Against this proposition, it is argued, that Mr. Wright was entitled to set off against the receipts any thing due to him from A. R. Bowes, or to pay the rents over to that individual. Now, after the notice, I apprehend either of those to be quite impossible. I apprehend, that after notice to pay the receipts and produce to a prior mortgagee, he had no right whatever to pay any of the proceeds of the estate to the mortgagor. Perhaps before the notice he might have had such a right, though it appears he had a prior notice from Mrs. Gibson, the first mortgagee. But independent of all this, I think that that argument is out of the question; because if Mr. Wright had any such case, he might have availed himself of it before this time. If he had paid any thing over to A. R. Bowes, he might have had what was so paid as an allowance before the Master; or if he had any other just set-off against his receipts, he might have had the benefit of it, by an application to the Court for that purpose. But nothing has come out to shew any such case; and it does seem to me, that under the present circumstances, he could have no such case. That being so, it appears to me clear, on the authority of *Quarrell v. Beckford*,† that he ought to pay interest. I forbear to re-state the reasoning in that case; it was the first in which this *question arose, and contains too much good sense and justice, to suffer the decision to be hastily departed from. Therefore, I am of opinion, that the executor ought to pay interest on the balance in his testator's hands, from the date of the notice till the present; and also on the subsequent annual balances due from his father and himself; not compound interest, but simple interest, from the end of each year as the rents were received. The next question is, at what rate the interest shall be paid. Five per cent. is claimed. But I am not inclined to go that length under the circumstances of this case. Four per cent. is the interest usually given in courts of equity. Undoubtedly, there are exceptions to that rule; but whoever claims more, must

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† 16 R. R. 214 (1 Madd. 269).

bring himself within one of the exceptions. I have looked through the cases, and heard the arguments, and I cannot find that this comes within the reason of any of those cases in which the Courts have given five per cent. Sir T. PLUMER, in *Quarrell v. Beckford*, looked upon the mortgagee as a trustee for the mortgagor: but I cannot consider Mr. Wright as a trustee for the subsequent mortgagees. There is a great difference between a man who by his contract has bound himself to make interest, and a person who holds as adversary against those entitled to hold. I cannot see how this differs from the common case of any person indebted, and compelled to pay interest. It seems that if the Court should decree five per cent. here, it would be an authority for giving it in almost every case. It is urged, that this gentleman having this money in his hands, purchased two shares of the Archdeacon mortgage, which shares bore five per cent. interest; and that having applied this money to the purchase of these shares, it is but just he should pay the same interest which accrued to himself from the unauthorised employment of it. But I cannot tell on what ground it is said, that he applied this money in particular to that purpose. There is another circumstance which would prevent me from assenting to *that reasoning; the minuteness of the object: because if I went upon that ground, I could only give five per cent. to the extent of the money actually laid out by him in that way. The allowance would necessarily be limited to the amount of the sums expended by him in the purchase of the shares, and would not extend to what he received for them. That would only go to nine hundred pounds, which seems to me to be an object hardly worth a deviation from the rule. Therefore I will adhere to the rule, and give only four per cent.

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There is a subsequent question respecting costs; and it is said that Mr. Wright ought to have his costs, because he is in the situation of a mortgagee; and it is contended, that it is a universal rule, that wherever a mortgagee is a party to a suit, he must have his costs, inasmuch as the object of his security is to give him his principal and interest, and all costs incurred in getting back his money. Now, in the first place, I do not think that that is a universal rule. Lord ELDON, in

ARCHDEACON *Detillin v. Gale*,† states it only as a general rule. Lord ELDON there says, “It is said, because he is a mortgagee, he is to have his costs. That is not of necessity. *Primâ facie* he is to have them certainly. The owner coming to deliver the estate from that incumbrance he himself put upon it, the person having that pledge is not to be put to expence with regard to that; and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified.” I read this only for the purpose of shewing that there is nothing in the case to prevent the Court looking at the question of costs, as between mortgagor and mortgagee. But here, it seems that that circumstance is very much out of the question. It is true, that Mr. Wright got into possession in that character; but through all the subsequent litigation, he had no claim for money due to him as mortgagee in possession. Without a shadow of justice, he held this mortgage in his hands; and all the subsequent proceedings *and expense resulted from this circumstance merely, that he persevered in holding the estate. So far therefore as he was an unsatisfied mortgagee in possession, during the early part of these proceedings, he may claim costs; and I suppose that in that respect they have been already provided for.‡ But as to the latter part of the proceedings, and as to so much of the enquiry as goes to ascertain the amount of the funds which these gentlemen improperly received and retained, it appears to me not only that Mr. Wright should not have costs, but that he should pay costs.

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† 6 R. R. 192 (7 Ves. 583). ‡ *Vide* Master's report, *ante*, p. 690.

BONE v. COOK AND OTHERS.

(McClelland, 168—178; S. C. 13 Price, 332.)

Testatrix devised real estate to S. J. for her life, and after her death and failure of issue, to trustees, to sell, and pay the proceeds to four persons in prescribed proportions; and in case of the death of any of the legatees "before such their respective legacies should or might become payable, then the legacy or part of him, her, or them so dying, to go to his, her, or their executors or administrators, as part of his, her, or their personal estate." And she gave the residue of the real and the personal estates to the trustees, upon trust as to the former, to sell and invest the proceeds, and as to both, to pay the interest, dividends, produce, and proceeds to S. J. for her life; and after her decease to pay certain pecuniary legacies, and then to pay the remaining trust monies to the same four persons, in the same proportions; "and in case of the death of any of the said legatees before their legacies should become payable, then the testatrix directed that the legacy of each of them dying should go to, and be paid amongst his, her, or their children, share and share alike; and in case of such decease of any of the said legatees, without having a child or children, the legacy of him or her so dying, should go to his or her executors or administrators, as part of his or her personal estate." One of the four legatees having died in the lifetime of the testatrix, unmarried:—held, upon the death of S. J. subsequently, without issue, that the legacy to that legatee had lapsed; although her children, if there had been any, would have been entitled to take it.

Trustees charged with a loss to the estate, and interest, occasioned by their voluntarily permitting a co-trustee to receive purchase money, and retain it a considerable time before calling for security, contrary to the trust; notwithstanding a provision in the will that the trustees should not be answerable for any trust monies, further than each person for what he or she should respectively actually receive.

SARAH GOODYER, by her will duly attested, and bearing *date the 28th of April, 1799, after giving a legacy of 100*l.* to Robert Cook, a defendant, gave and devised unto Sarah Jelley, single woman, a piece or parcel of meadow ground, to hold the same unto said S. J. and her assigns, for her life, with remainder unto all and every the child or children of her the said S. J. lawfully begotten, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should live to attain that age or be married; if more than one, as tenants in common in fee, and if only one, then the whole to such one child in fee. And in case said S. J. should have no child, who should live to become entitled to the said meadow

1824.
April 30.

*Gray's Inn
Hall.*

*Exchequer
Chamber.*
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ground, then, from and immediately after the death of the said S. J. and failure of issue, the testatrix devised the same unto the said Robert Cook, Edward Chitty the elder (a defendant), Edward Chitty the younger (a defendant), and John Attfield, deceased, their heirs and assigns, upon trust, to sell and dispose thereof, and pay one moiety, or half part of the money arising by such sale, unto John Jelley (a defendant), and pay one half part of the residue of the said money unto Mary, (a defendant since deceased,) the wife of the said E. C. the elder, and the other half part unto and between the two children of Elizabeth Bone, late of Chertsey, deceased, equally between such children, share and share alike; and in case of the death of any of them, the said J. J., M. C., and the children of the said E. B., or either of them, before such their respective legacies should or might become payable, then the legacy or part of him, her, or them so dying, to go to his, her, or their executors or administrators, as part of his, her, or their personal estate. And the testatrix thereby devised unto the said R. C., E. C. the elder, E. C. the younger, and J. A., their heirs and assigns, all other her messuages or tenements, rents, hereditaments, and real estate, to hold the same unto the said R. C., E. C. the elder, E. C. the younger, and J. A., their heirs and assigns *for ever, upon trust to sell and dispose of the said messuages, &c. either together or in parcels, for the best price or prices that could be gotten for the same; and to place out, and invest all the monies arising by the sale thereof in the public funds, or Government securities, or other good real securities, as they should think proper, and pay the interest, dividends, annual proceeds, and produce thereof, in manner thereafter directed. And then after bequeathing unto the said S. J. the use of such of her household goods and furniture as she should think proper to take during her natural life, the testatrix thereby bequeathed unto the said trustees, their executors and administrators, all and every sum and sums of money which should stand in her name at the time of her decease, and belonging to her, in the books of any public companies or funds, and all other her personal estate of every sort and kind, upon trust, in the first place to pay her just debts and funeral expences,

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and the said legacy of 100*l.* to the said R. C. and then to pay the interest, dividends, produce, and proceeds thereof, and all the interest, dividends, produce, and proceeds of the monies arising by the sale of the said messuages, &c. therein before mentioned to be directed to be invested, unto the said S. J. for and during the term of her natural life, or otherwise to permit or suffer her to receive the same to and for her own sole and separate use and benefit; and from and immediately after the decease of the said S. J. upon trust to pay certain pecuniary legacies. And after the said payments, upon trust, as to one moiety of all the said trust monies, to pay and transfer the same unto the said John Jelley; and as to the residue, to pay and transfer one half part thereof, unto the said Mary Chitty, and the other half part unto and between the two children of Elizabeth Bone late of Chertsey, deceased, equally between such children, share and share alike; and in case of the death of any of the said legatees before their legacies should become payable, *then the said testatrix willed and directed that the legacy of each of them dying should go to, and be paid amongst his, her, or their children, share and share alike; and in case of such decease of any of the said legatees, without having a child or children, the legacy of him or her so dying should go to his or her executors or administrators, as part of his or her personal estate. The will contained a proviso, that the trustee or trustees for the time being should not be answerable or accountable for any trust money further than each person for what he or she should respectively actually receive, and not the one for the other or others of them, or for the acts, receipts, or defaults of the other or others of them; but each person for his or her own acts, receipts, and defaults only, and not for any loss that might happen by defect in title, or value of any fund or security, in or upon which any trust should be invested, or by the failure of any banker or bankers with whom any trust monies should be lodged, nor for any involuntary loss whatsoever.

The trustees were appointed executors. The testator died in April, 1809, leaving J. Jelley and William Attfield (a defendant) her heirs-at-law. The executors nominated, except E. C. the

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younger, proved the will; and they all joined in executing the trusts thereby reposed in them. Sarah Jelley died in September, 1818, unmarried and without issue, having during her life time possessed and enjoyed the estates and interests which had been devised and bequeathed to her. Anne Clapham Bone, one of the children of Elizabeth Bone, died in the life time of the testatrix, intestate and unmarried, leaving her brother, William Bone the plaintiff, her heir-at-law; and letters of administration of her goods and chattels were granted to him, whereby he became her legal personal representative. J. Attfield died in May, 1817, an uncertificated bankrupt. The bill was filed by W. Bone against the surviving trustees, the heirs-at-law, Mary Chitty, the assignees *of J. A., Joseph Jennings a mortgagee of the plaintiff's share of the property of the testatrix, and W. S. Clarke, and J. C. Clarke, other incumbrancers, for establishing the will, and carrying the trusts thereof into execution: that in taking the accounts, the surviving trustees might be debited with the loss occasioned to the trust estate, by their placing a sum of 1,200*l.*, the purchase money of a part of the real estate, in the hands of J. Attfield, or permitting him to receive or retain it: and that the plaintiff might be declared entitled to two eighth shares of the residue of the real and personal estates; one eighth share in his own right, and another as the personal representative and sole next of kin of A. C. Bone. In May, 1822, a decree was made for taking the accounts, and directing various enquiries auxiliary to the objects of the bill, and in particular as to the 1,200*l.* purchase money.

The Master, after finding the facts above stated, reported, that J. A. had obtained possession of the 1,200*l.*, at different times before and on the 8th of February, 1814; that the receipt for it had been signed by all the trustees: and that it had been received by J. A. with the consent, privity, and knowledge of the other trustees, but more especially of E. C. the younger, as to 600*l.* part thereof; that E. C. the younger had possession of, or power over that part previous to the 1,200*l.* getting into the hands of J. A.; and that it had been paid by E. C. the younger or his agents, on account of, and for the benefit of J. Chitty (his brother), the purchaser, to J. A.: and that the residue had been

paid to, or settled in account with J. A. by the said J. C., with the privity and consent of the other trustees. He also reported specially, that in October, 1816, the co-trustees had required J. A. to invest the 1,200*l.* on some security; and that he was unable to do so, but that he executed a mortgage to them of the only real estate he was seised of, for securing the repayment, and also a warrant of attorney to *confess judgment in the sum of 2,400*l.*, as a further security, but with a stay of execution for six months. That in the mean time, viz. in February, 1817, a commission of bankrupt was issued against J. A., and he was declared a bankrupt; that the mortgaged premises were sold by the trustees for 700*l.*; that R. Cook, on behalf of the trust estate, proved under the commission the sum of 579*l.* 12*s.* 8*d.*, being the remainder of the 1,200*l.* with interest, and the costs of the sale, and received two dividends; and that in consequence of the said sum of 1,200*l.* having been received by J. A., in manner as thereinbefore mentioned, the testatrix's estate had sustained a total loss of 390*l.* 12*s.* 10*d.* The Master further reported specially, that there had been another small loss occasioned to the estate through an omission of the trustees to re-invest certain stock immediately, which had been sold, and the produce for some time placed in the hands of their bankers.

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The cause coming on for further directions on the report, the principal questions were—1st. Whether the legacy to A. C. Bone had lapsed, by her death during the life of the testatrix. 2ndly. Whether the co-trustees were chargeable with the losses which had been occasioned to the trust estate. 3rdly. If they were so chargeable, whether the loss was a debt bearing interest.

Fonblanque and Duckworth for the plaintiff.

Combe, for W. S. Clarke and J. C. Clarke, incumbrancers on the plaintiff's share, in the same interest :

1st. The legacy has not lapsed: *Sibley v. Cook*,† *Bridge v. Abbott*,‡ *Darrell v. Molesworth*.§ In the first case, Lord HARDWICKE laid down two conditions as necessary to prevent a

† 3 Atk. 572.

§ 2 Vern. 378.

‡ 3 Br. C. C. 224.

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legacy from lapsing: first, that *there should be a clear intention expressed, that it should not lapse; secondly, that it should be given over to some other persons, in the event of the first legatee dying before it should be payable. Here both conditions have been complied with. None of the cases is in precisely the same circumstances with this. The addition of the provision, that in case of the death of any of the legatees before their legacies should become payable, the legacy should go to the children, distinguishes this from, and makes it much stronger, than the common case of a direction that it should go to the executors and administrators, which would not prevent a lapse. In this case, there is an express substitution. 2ndly. The trustees have been guilty of breaches of trust, and therefore they must be charged with the losses which the trust estate has incurred through their default: 3rdly. and with interest.

. The LORD CHIEF BARON expressed an opinion against allowing interest, on account of the smallness of the balance.

Martin, H., and Beames, for the co-trustees.

Simpkinson, for the assignees of J. Attfield, in the same interest.

Bridger, for John Jelley, also in the same interest:

The legacy has lapsed. To take a case out of the general rule of construction, the intention must be clearly and explicitly stated on the face of the will: *Maybank v. Brooks*,† *Elliott v. Davenport*.‡ In all the cases cited on the other side, the intention that the legacy should not lapse was manifest. It is not so here. In *Sibley v. Cook*, the decision turned very much also on the words “before the same become due and payable;” and unless the construction there put upon them had been *adopted, those words would have been totally unintelligible and ineffectual. The same observation applies to *Darrell v. Molesworth*. But the necessity of that construction does not exist in the case before the Court, because it is very differently circumstanced.

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† 1 Br. C. C. 84.

‡ 1 P. Wms. 83.

In *Sibley v. Cook*, there was no tenant for life; in this, there is; and in consequence, the words of this bequest can be satisfied by another, and a grammatical construction. There, the words mentioned, to have any effect, could only apply to the death of the testator; here, the words properly apply to the death of the tenant for life, and not to that of the testatrix, who only meant to treat the legacies as vested interests, from the time of her own death. This distinction was taken in *Corbyn v. French*.† 2ndly. As to the misapplication of the funds, the trustees must be bound by the conclusion to which the Master has come.

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Fonblanque, in reply :

The circumstance of there being a mesne estate does not affect the question.

ALEXANDER, C. B. :

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In this cause there are only two questions: the one as to the construction of the will; the other, as to the liability of the trustees. With respect to the first, I have a very clear opinion upon it; I think that this is a lapsed legacy. [His Lordship then stated the clauses of the will, of which the construction was disputed, and proceeded.] One of the children of Elizabeth Bone died unmarried, in the life time of the testatrix: and the question has been raised, whether in consequence of that event, the legacy to that child followed the common rule; that is to say, became lapsed, or should go by force of the last-mentioned clause, to her executors or administrators, as part of her personal estate. If the Judge should think that it did not lapse, then the question *would naturally arise, who would be entitled to take it; but as I am of opinion that it does, that question does not present itself. I do not think it has been very confidently contended, that if it had not been for this particular provision, "and in case of the death of any of the said legatees before their legacies should become payable, then the said testatrix willed and directed, that the legacy of each of them dying should go to, and be paid amongst his, her, or their children, share and share alike;" the present question would

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† 4 R. R. 254 (4 Ves. 418).

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have extended to any material compass. Because the rule of construction of the other words, independently of those, seems perfectly undisputed, according to the language used by Lord ALVANLEY in *Corbyn v. French*, with which I entirely agree. That where there is a tenant for life of a fund, out of which the legacy is to be paid, so that there is an interval between the death of the testator and the time when it is payable, and a provision that in case of the death of the legatee before the legacy should become payable, it should go to the executors or administrators, the provision shall only apply to the case of the legatee dying at any period between the death of the testator, and that of the tenant for life. It may be a question, (and it seems to have been decided affirmatively in one case, but in such a way that I could not think myself bound by it,) where there is no tenant for life, and a bequest is made, with a provision similar to that I have now stated, whether, there being no other period to which the words can apply, they should not operate as a substitution in the event of the legatee dying in the life time of the testator. That may be a question. But where there is another term to which the words in question can apply, the rule is clearly different, and was stated by Lord ALVANLEY in *Corbyn v. French* in these terms: "A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. I will not determine now, because it is not necessary, *that where a legacy is given to a person or his representatives, it can mean any thing, but in case of his death in the life time of the testator; but it is perfectly clear, that where the fund is given to one for life, and after the death of that person to several others, and in case of their deaths, to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the legatee in the life of the testator." That appears to me to state truly the rule of the Court upon this subject, the rule which I think ought to govern this case.

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I do not doubt but that where the testator has expressed his intention very clearly, you may make a substitution in the event of the legatee named dying in his life time, and that was the case in the authorities cited on the other side. It was the

case in *Sibley v. Cook*. There there was a declaration almost in express terms, that the legacies should not lapse. The effect of the provision in *Bridge v. Abbott* is the same, the testatrix referring directly to the circumstance of the residuary legatees dying in her life time. No body can doubt the power of a testator to prevent a legacy lapsing; but, to be effectual, it must be exercised in express terms. I do not deny, that in this case the children, if there had been any, would have taken the share, though the legatee had died in the life time of the testatrix. I take that to be consistent with the reason of the cases, and agreeable to the principles on which *Miller v. Warren*,† and *Willing v. Baine*‡ were decided.

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So far I think the argument for the plaintiff quite founded; but I do not think the consequence which has been drawn from it, follows in this case. I look upon this as nothing more than a legacy to a legatee, with an anxious expression that she should have it if she survived the testatrix: and if she should have children, and should die before the testatrix, *that they should take it: and if that conditional limitation, (if I may use the expression on this occasion,) does not happen, that is, if there are no children, that the case is to be considered the same as if there were no conditional limitation. And that not happening here, I consider the effect the same as if the legacy had been to a person, and in case of his or her dying before it should become payable, then to his or her executors or administrators. The consequence is, that the legatee having died in the life of the testatrix, the legacy, according to the doctrine laid down by Lord ALVANLEY, becomes lapsed. With respect to the other question, the liability of the trustees, I have no doubt upon it. I do not know whether it does not principally affect E. Chitty the younger; but they are all liable under the circumstances stated in the Master's report. They have all acted under the will, and interfered with the general estate, and therefore they must be liable.

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On a subsequent motion to settle the minutes, the LORD CHIEF BARON granted interest at 4 per cent., on the loss of 390*l.* 12*s.* 10*d.*,

† 2 Vern. 207.

‡ 3 P. Wms. 115.

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from the date of the commission of bankruptcy, considering the conduct of the co-trustees in respect of that loss, a clear breach of trust.

1824.
May 18.
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DACIE v. JOHN.

(McClelland, 206—208 ; S. C. 13 Price, 446.)

Where a partnership has expired by effluxion of time, and in a suit for an account, &c., a receiver has been appointed before decree, the Court will not compel the defendant, the former managing partner, to deliver up to the receiver, for the purpose of making out bills of costs, partnership books, and accounts, which have remained in his hands, and title deeds belonging to a third party, which came into the possession of the co-partners as solicitors, such defendant offering the receiver free access thereto, and to assist in making out the bills.

THE parties to this suit had carried on the business of attorneys, solicitors, and conveyancers, as co-partners, from October, 1812, till October, 1819, when the co-partnership expired by effluxion of time. In Michaelmas Term, 1822, the plaintiff filed a bill for an account of the partnership dealings, a receiver, and injunction. And on the coming in of the answer, an order was made on motion for the appointment of a receiver. Some of the deeds and papers relating to the co-partnership affairs remained in the hands of the plaintiff, and some in the hands of the defendant. The partners had been, in and previous to August, 1818, concerned for two clients, J. Sparling and T. Jones, now T. L. Longueville, in the purchase of an estate called the Stanwardine estate, and in other matters ; and in the course of those transactions, the title deeds, and other papers, came into their possession, and were now held by the defendant. The bill of costs for this business, which would amount to a considerable sum, as well as several others on the partnership account, not having been made out and delivered, applications were made by the receiver to the defendant at various times, and in particular by letter on the 18th March, to hand over to him all deeds, documents, books of account, &c., which might be necessary to enable him to prepare for delivery all such bills, and in particular a draft bill of costs, and the title deeds, evidences, and writings, in the matter of the purchase of the

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v
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Stanwardine estate. The defendant replied by letter, that all the books, accounts, &c. in his possession, were equally in the possession of the plaintiff, he having a key to the box containing the bills; that the receiver might have free access in his office to the bills, or books, to inspect them, or take copies or extracts; and that he would give every required information or explanation in his power. He pledged himself to finish the draft bill in question as speedily as he could, but declined to give up the title deeds in the absence of the purchaser, or the other documents.

Seymour, on behalf of the receiver, now moved upon notice, that the defendant might, within ten days after notice, deliver to the receiver upon oath all deeds, documents, books of account, accounts, papers, and writings, which might be necessary for the purpose before-mentioned, and in particular the draft bill of costs against T. L. Longueville, together with the title deeds, &c. which came into the possession of the parties as solicitors to T. L. L., and on which they were entitled to any lien in respect of their costs; or that he might produce, and leave his title deeds, &c. with his clerk in Court, within ten days after notice. The affidavits in support of the motion stated the applications to the defendant, and his refusal, notwithstanding that the plaintiff had delivered up to the receiver all such deeds, &c. as he had required; that by reason of such refusal, the receiver was unable to collect the debts due to the partnership, and that the plaintiff claimed a lien on the title deeds: and it was submitted to the Court, that the offer made by the defendant was nugatory, inasmuch as the papers could not be examined to any useful purpose, in the noise and interruptions incident to an attorney's office.

Koe opposed the motion, on an affidavit by the defendant, corroborating the statements in his reply, and stating that the receiver had been at liberty to proceed against any of the persons from whom the bills were due; and that the bill or bills in the matter of the purchased estate were very long and intricate, but that they were nearly completed.

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GRAHAM, B.:†

It strikes me that to grant this motion would be an injunction in itself. The application appears to me not only unnecessary, but improper in the extreme. It goes beyond any thing I ever heard of; and I think it ought to be refused with costs.

GARROW, B.:

It has been argued at the Bar that the present application ought to succeed, because four or five former applications against the party succeeded; but I am clearly of opinion that it is one which ought not to have been made. It has been suggested that it is a very difficult thing to look into those books and papers in the bustle and confusion of an attorney's office. But has the receiver tried whether it were practicable, and if it were not, might he not have an inner room for the purpose? But instead of that, he seeks to compel the defendant, as if he were an insolvent man, to hand over the books, and accounts, and deeds, and writings which have come into his possession as a solicitor, to another custody. Therefore, I think that however numerous and successful other applications have been, we ought to discourage any future one similar to this, by rejecting it with costs.

HULLOCK, B.:

I am entirely of the same opinion.

Motion refused, with costs.

† The Lord Chief Baron was sitting in the Exchequer Chamber.

WINTER v. LETHBRIDGE, BART.

(McClelland, 253—270; S. C. 13 Price, 533.)

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May 15, 29,
31.

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An award will not be set aside upon any ground, which in truth is a question upon the merits between the parties.

An arbitrator, in regulating the future use of a stream of water the right to which was divided between the parties, interfered with the customary enjoyment by one of them of another stream, which exclusively belonged to him, and which joined the first: Held, that he had a power to do so, incidental to, and resulting from his former direct and larger power.

If an arbitrator, after regulating on the subject matter referred to him in its present state, goes on and regulates prospectively on the same subject matter reduced to a different state, and thereby in some degree altered, *quære*, whether that be a proceeding beyond his authority.

Though the award be bad in that respect, yet that does not vitiate those parts which are otherwise unobjectionable; and it may stand *in toto*, until the particular contingency arise to which the prospective regulation applies.

THIS was an action on the case for obstructing a water-course. The parks and lands of the parties to the cause adjoined each other, the plaintiff's lying to the south of the defendant's. The latter contained a great number of ponds, and the contiguous grounds generally declined in a *southern direction. Two of those, called the New Pond and the Stew Pond, communicated with one another, and were supplied by a stream flowing into the former, which was the northernmost, from certain springs, and another and a much smaller pond. The water of this stream, which was the subject of the action, was discharged from the Stew Pond by three apertures with tunnels in its southern bank, one carrying it eastward, one southward, and one westward. The middle, or southern, had a syphon attached, for the purpose of watering an adjoining close of the defendant, called Brickfield Meadow. The two others led down into a ha! ha! ditch, or sunk fence, immediately to the south of the pond, running eastward and westward. This ditch communicated on the eastern side with other ponds belonging to the defendant, of which one of very considerable size, that had been recently made, was in part fed by the water carried along it. The water which passed through the western aperture was conveyed along the

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WINTER ha! ha! westward into the channel of an ancient and natural
r. stream, which (originally having had its head in one of the
LETHBRIDGE ponds) flowed in a southerly direction across the defendant's
lands, and running through an underground tunnel, which was
placed under the bed of the large pond before mentioned, entered
into the plaintiff's grounds at their northern boundary; and
passing under an old archway, at the northern end of which was
a floodgate, or weir and sluice, then, if not penned back, pursued
its natural course southward through and out of the plaintiff's
closes. But there were two ancient carriage gutters, one on the
east, the other on the west of the arch, by the former of which
the water of the stream, when penned back by lowering the flood-
gate, might be carried out of its course eastward and southward,
either for the supply of a pond of the plaintiff, called Sandy's
Pond, or (through a third carriage gutter) for the irrigation of
one of his closes called Sandy's Mead, or meadow. The carriage
[*255] gutter on the *west was used for carrying the water, when penned
back, southward, in a direction nearly parallel to its natural
channel, for the irrigation of the lower parts of another of the
plaintiff's closes called Long Meadow.

The plaintiff claimed a right to the stream of water flowing
through and from the two ponds, except only such part of it as
was necessary for irrigating the defendant's close called Brick-
field Meadow, (situate to the south of the ponds, and the east of
the water-course) insisting that the whole of it, with that excep-
tion, ought to run down the water-course and into his closes, for
the purposes before stated; and complained that a large quantity
of it, and more than was necessary for watering defendant's
said close, was wrongfully diverted out of that course along the
ha! ha! eastward. The plaintiff had another stream, which,
issuing out of a mill-pond, called the Ash Mill-Pond, at some
distance to the west of the meadows, and running through his
own closes exclusively, joined the water-course at the archway,
and by means of the weir and sluice before mentioned, or by
putting down an obstruction across the carriage gutter leading
to Sandy's Pond, at a point called Brickfield Gap was, together
with the water in dispute, employed in irrigating the meadows,
or conveyed to that pond.

On the trial of the cause at the Lent Assizes for Somersetshire a juror was withdrawn ; and under an order of *Nisi Prius*, which was afterwards made a rule of Court, it was agreed to be referred to a gentleman at the Bar, who was “to settle all matters in difference between the parties, and to decide what was the right to the water claimed in the action, and to regulate the use of it in future, and to order and determine what he should think fit to be done by the parties respecting the matters in dispute.” The arbitrator, assisted by professional men, having gone over the premises, and minutely investigated the use and application of the water, and examined a great number of witnesses, made a special award, and found, first, that *the right to the stream in question was a right divided between the plaintiff and the defendant ; that is to say, that the defendant had a right to use the same for the watering of Brickfield Meadow, and to divert the same for all other purposes when and where he might require the same ; and in so doing wholly to prevent the same, or any part thereof, from running down to the closes of the said plaintiff ; and also had a right to turn the whole of the same down to and through the said last-mentioned closes at all times of the year, at his free will and pleasure ; to pass without interruption in the water-course there through and out of the said last-mentioned closes, subject only to the two following qualifications : firstly, That at the several times in every year when Brickfield Meadow should not be in watering, and when the time should be seasonable for the watering of the plaintiff’s said closes, the plaintiff had a right to have so much of the water of the stream flow freely down unto and into them, as should be sufficient during such seasonable times for the watering of such parts of them, as by reason of the level of the ground therein were capable of being watered with the same, and there to use the same for that purpose : and secondly, that the said plaintiff had a right from time to time, at all times of the year, to a reasonable supply of water from the said stream, for the necessary feeding of Sandy’s Pond. The arbitrator then noticing that it might hereafter become desirable for the said defendant to fill up and destroy both the said ponds ; secondly, ordered and awarded, that until the ponds should be destroyed and filled up,

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the use of the stream of water should be regulated in the following manner : That within one calendar month from the date of the award, the defendant should at his own costs and charges cause to be made two apertures, or channels in the south bank of the said Stew Pond, in the same places respectively in which the eastern and western apertures then were, and no more, to be each sixteen inches *wide and no more ; and that the sill of each should be five inches below the sill of the then present aperture which carried the water southward, and no more ; that the said apertures should be of substantial brick, stone, or wood-work, and fitted with hatches, or flood-gates, watertight ; and that the defendant should at all times keep the westernmost of the two free and clear from all obstructions on both sides of the hatch or flood-gate belonging to the same, and also make a clear and free passage for the water to flow through the same, down and into the ha ! ha ! ditch, and thence to the head of the water-course ; and also once in every year, in the month of October, cleanse out, and throw the water course down to the spot where it joined the mouth of the underground 'tunnel, so as to leave a free course and channel for the water to run therein. And he further directed, that from the 1st of January, to the 31st of March, 1824, and thereafter from the 1st of November to the 31st of March in every year, the defendant should securely and effectually close down the eastern, and keep open the western aperture from 9 o'clock in the morning of Monday, till 9 o'clock in the morning of Wednesday in every week ; and also from the 1st day of April to the 1st day of November in each and every year, should, without closing the eastern, unless at his own free will and pleasure, keep open the western aperture from 9 o'clock in the morning of Monday to 9 o'clock in the morning of Tuesday ; and from 6 o'clock in the evening of Thursday, to 9 o'clock in the morning of Friday in each and every week ; and during those times respectively, suffer the water of the stream flowing from the western aperture, to have a clear and free course down to the closes of the plaintiff. The award proceeded as follows : " And I further direct and award, that whenever the said two first mentioned ponds of the said defendant, or either of them, shall be filled up and destroyed, the said two last mentioned

apertures shall remain and be preserved; *and that the said stream by which the two first mentioned ponds are now supplied shall be brought to the same, and the direction of the whole of the water, and the half thereof respectively, shall be regulated for the same days in the week, and for the several months respectively of each year, as I have hereinbefore awarded and ordered during the existence of the said two ponds; and that the said defendant shall make no aperture, or channel for the carrying the water southward, the sill of which shall not be at the least five inches higher than the sills respectively of the said two eastern and western apertures." It then went on to provide that the plaintiff should at no time change the situation or direction of the carriage gutters, or any of them, so as to raise their level, and render it necessary to raise the surface of the water higher than was then sufficient to force it through the carriage gutter running on the west of the archway; and also within one calendar month from the date of the award, should make the carriage gutter used for the supply of Sandy's Pond, at least three feet wide through the whole course, and so levelled as to give the water a free descent to that pond; and also within the said time, should provide a sufficient water-tight flood-gate, at a gap in it called Brickfield Gap, through which the gutter conveyed the water to the same pond: and that from the 1st of November in every year, to the 1st of April then next following, the plaintiff should be at liberty from 9 o'clock in the morning of every Monday, to 9 o'clock in the morning of the then following Wednesday, to lower and fasten down the hatch or flood-gate at the arch, and to raise the water so high as to run through the carriage gutter on the west of the water-course; and to use the said water for the purpose of watering the said parts of Long Meadow and Sandy's Meadow, or for the necessary supply of Sandy's Pond, he having first securely closed down the flood-gate at Brickfield Gap, whenever the water was to be used for the purpose of *watering the two meadows. And that from the 1st of April in every year to the 1st of November then next following, the plaintiff should be at liberty from 9 o'clock in the morning of every Monday, to 9 o'clock in the morning of every Tuesday then next following; and from 6 o'clock in the evening of every

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Thursday, to 9 o'clock in the morning of the next day, to lower and fasten down the hatch or flood-gate across the arch, and to raise the water so high (and no higher) as would be necessary to give it a free descent to Sandy's Pond, and to carry it to the said pond for the necessary supply thereof; and that the plaintiff should at no other times hinder or obstruct the free course of the water of the stream through the archway down its ancient and natural channel, by any hatch, flood-gate, or in any manner whatever, without the express permission first obtained of the defendant. The award contained other regulations proper for securing the observance of those which have been specified.

Adam obtained a rule in Hilary Term, upon a number of affidavits, calling on the defendant to shew cause why the award should not be set aside, on the following grounds:—

1st. That the arbitrator having awarded for the plaintiff, certain portions of the water from the Park Ponds, at certain periods specified in the award, had deprived him of the enjoyment of that right, by the mode in which he had regulated the use of the water, both as to irrigation and the supply of Sandy's Pond. 2nd. That by the mode in which he had directed the park water to be regulated by his award, he had deprived the plaintiff of the use of his Ash Mill water, which was not a matter in difference, nor subject to the controul of the arbitrator. 3rd. That in regulating prospectively the manner in which the park water should be used when the ponds should be filled up, the arbitrator had proceeded beyond his authority; that

[*260] *contingency not being any part of the subject referred to him, it being impossible to regulate the enjoyment of the water before the effects of such filling up were ascertained.

The affidavits were made by labourers who had been employed on Mr. Winter's estate during long periods of time, a civil engineer and surveyor, and the solicitor in the cause, and stated, that the proper times for watering the two meadows were just before, and after their being mowed, and from time to time during the summer season (when only half the stream was awarded to the plaintiff during thirty-nine hours weekly). That to the best of their judgment and belief, the whole of the water

which formerly usually flowed from the two park ponds at that season, was not more than sufficient for watering them, and filling Sandy's Pond. That if the directions of the award should be observed, no part, or but a very small and inconsiderable part of the park water would ever reach Sandy's Pond during the summer months; and that the plaintiff might be prevented by frost, or other cause, from using it, or the Ash Mill water at all for several weeks, when it might be necessary during the five winter months. That the Ash Mill water did not form any part of the water claimed by the plaintiff in the action; and that from the levels taken, that water could not be carried to Sandy's Pond in its present channel, without putting down an obstruction at the archway across the water-course; nor used in irrigating the meadows, without placing an obstruction across the carriage gutter leading from the archway east and south towards Sandy's Pond. And that on the whole it would be impossible either to supply Sandy's Pond, or irrigate the meadows properly with the water from either of the streams, consistently with the prescribed regulations. Several affidavits, three of them by civil engineers and surveyors, who attended the proceedings under the reference, were produced in answer, purporting that all the persons who had sworn the affidavits *in support of the rule, with the exception of the solicitor, had been examined by the arbitrator; and that it would be easy for the plaintiff, at an expence not exceeding 20s. or 30s. at most, to convey the Ash Mill stream over the archway standing across the water-course, and then water Sandy's Meadow and supply Sandy's Pond therewith; that it had been formerly so conveyed by means of a tunnel; and that the whole of Long Meadow could be (now) irrigated with the water from the Ash Mill Pond.

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(After the rule *nisi* had been granted, the defendant proposed through his counsel to erect and keep in repair a tunnel, or any other structure or machine necessary for the carriage of the water over in the manner suggested; but this not being acceded to,)

[The rule having been argued,]

ALEXANDER, C. B. :

May 31.

This is an application made to set aside an award upon three

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grounds. The question between the parties was as to a water-course, which ran out of the lands of one into the lands of the other. At the trial, it was referred to a learned gentleman at the Bar to decide on the right to the water, and afterwards to regulate the use of it in such a manner as to do justice between both parties. The first ground upon which the award has been impeached is, that the arbitrator having awarded a certain right in the water to the plaintiff, has proceeded to regulate the enjoyment of that right in such a way, that he has not carried into effect the principle which he had stated in the outset. It appears to be an acknowledged principle, that you cannot come to set aside an award upon any point, which in truth is a question on the merits between the parties. Now, it seems to me, that this application falls exactly within that rule: that it is in effect an application upon the merits: and that it involves a charge that the arbitrator has not done justice upon the merits. Two things were referred to the arbitrator; the one was to ascertain the rights of the parties, the other, to regulate in what manner they were to exercise them. He has ascertained their rights; and there is no objection, I think, to that part of his award. What are the regulations requisite to carry into effect the rights adjudicated, is a part of the merits which have been referred to him; and were we to disturb the award on this account, we should be acting directly against the principle I have mentioned; we should be saying that the arrangement adopted, is one which he ought not to have established upon his own principles. He has said, "this arrangement *is requisite to effectuate the enjoyment of the rights I have found." That was a matter submitted to his judgment by the reference, and therefore that ground in the case fails. The next ground is, that the plaintiff has a certain stream of water coming from a pond called the Ash Mill Pond, which in no manner belonged to the defendant, which was not at all in question between the parties, and respecting which nothing was referred to the arbitrator; but that he has nevertheless acted upon it, and deprived the plaintiff of the use of it. It is not said, nor is it so, that the arbitrator has in language expressly interfered with this right; but it is averred, that by his manner of regulating

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the enjoyment of the water-course, which was unquestionably necessary to be regulated, he has in point of fact prevented the plaintiff from having the benefit of that other stream which was not in question. Now it appears to me, that this is not exactly the same thing as the first objection, but that it comes very near it. Because, not having acted upon it directly, the allegation is, that he has so regulated the other stream, that the plaintiff cannot have the advantage of this. Now that appears exactly the same thing as if it were said, that the arbitrator had so regulated, that he had rendered useless some of the lands of the plaintiff. But it was for him to consider that; he was to regulate the exercise of a specific right, and he has done that so, in his judgment, as not to affect any thing beyond what was necessary for the performance of the duty committed to him. He has taken a great deal of pains in investigating the rights on each side; his award does not materially affect this particular right, and I do believe that the party complaining may have the enjoyment of it at little expence. The question on this point being, whether the plan of regulation pursued, be one which exceeds the authority given by the reference; my opinion is, that it does not, because the arbitrator *must have had before him all the mischief which that plan would produce to one party, or the other. The third ground of objection is this; that a part of the award goes beyond what was comprised in the submission; because the arbitrator, after having provided for the application of the stream during the existence of the ponds from which it is derived, has gone on and acted upon the hypothesis of those ponds not remaining in their present state. Having some idea that the water of those ponds might be carried away, he has proceeded anxiously to provide for that event; and he has directed that whenever it shall happen, the same quantity of water which he has given to the plaintiff now, shall be then brought to the same point. Without saying whether that is, or is not, beyond his authority, I much wonder at the plaintiff making it a ground of complaint, because there is nothing in it but for his benefit. I apprehend that the object of this award in substance is, to give the plaintiff, while things remain in their actual situation, all the advantages to which he is entitled,

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and to guard him from any inconveniences that may result from a change. I do not see that it is fairly liable to any of the inconsistencies or other defects with which it has been charged ; and therefore, I think, upon the whole, that this application to set it aside ought not to succeed.

GRAHAM, B. :

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My LORD CHIEF BARON has so fully expressed the opinion which I have formed upon this application, and the reasons upon which it is founded, that I must almost content myself with saying, that I concur in both. All the objections which have been made to the award, either do not apply, or go to the merits of the case. The first objection is, that the arbitrator, after deciding the right to the water claimed, has totally precluded the exercise of that right, by the mode of management and application which he has pointed out. There seems nothing in this but what goes to the merits. It being in terms left *to the arbitrator, to decide what was the right to the water, and to regulate the manner in which it should be exercised in future, he has done so ; adjudging a division of it between the lands of the plaintiff and of the defendant ; and that the plaintiff shall not have the use of it at all times of the year, but only during prescribed periods, at different seasons. I can easily conceive that that party may feel some uneasiness at not having the same uninterrupted course of the water which he had enjoyed for years ; but his complaint only amounts to this, that the arbitrator has exercised his judgment on the matter committed to him in a manner not satisfactory. The second objection is more embarrassing in its nature ; but it is easy to understand enough of this cause to see that no injury has been done by the award. It is said, that the plaintiff is entitled to the exclusive use of the water called the Ash Mill stream ; that under former circumstances, the water which passes from the ponds in Sir T. Lethbridge's grounds into Mr. Winter's, united with this at a sluice common to both streams ; that no part of the body so formed could be applied to its usual purposes, without closing the flood-gate there ; and that the arbitrator, by authorizing the plaintiff to close it only at particular times of the year, has by that means

debarred him from the free use of the Ash Mill water. Now the arbitrator, in making his award, has been very cautious not to interfere with the use of the Ash Mill water, except incidentally. And it is said, that it rests entirely with Mr. Winter himself to get rid of the inconvenience complained of, by adopting the mechanical contrivance suggested, which Sir T. Lethbridge proposes to apply and keep up at his own expense. This regulation then is no deprivation of the plaintiff's right, and is clearly a consequence of, and within the power given to the arbitrator. It is within his power, because he might have directed a tunnel to be placed in any situation he thought proper; nor does it constitute an *excess, that in forbearing to do so, he has imposed some inconvenience on Mr. Winter, which may be removed in that manner. The only remaining part objected to is the regulating for the contingency of filling up the ponds. But in my view of the case, this was within the scope of the arbitrator's authority, because it was his office to regulate the use of the water in all future events. Considering that at some future period Sir T. Lethbridge might destroy those ponds, that their destruction might cause some diminution of that supply of water which nature and custom had given Mr. Winter, and to which he would still have a right, the arbitrator resolved to secure to him in that event all the benefit which nature and his directions had conferred on him in existing circumstances. That was the object of the regulation now under discussion. If it was not within the extent of the arbitrator's authority, at least it has inflicted no injury on the plaintiff; and if, in this respect, he has wandered a little in kindness to the party, the propriety of the direction may be more fully discussed at a future time, whenever occasion calls for it. All the objections made against those parts of the award which apply to what was clearly under his controul, do not seem to affect its validity, as to its material effects; and I am of opinion that going only to merits, they ought not to prevail.

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GABROW, B. :

This was an action brought by the plaintiff for a stream of water, which flowed from the defendant's lands into his. At the

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trial, it appeared that to decide the cause merely would by no means settle the disputes between the parties; and it was in consequence referred to the determination of an arbitrator. It is therefore important to see what the terms of the reference are. The terms are "to settle all matters in difference between the said parties, and to decide what is the right to the water claimed in this action, and to regulate the use of it in future, *and to order and determine what he shall think fit to be done by the parties respecting the matters in dispute." The arbitrator has accordingly determined the right, and has directed the mode of distribution to the plaintiff of his portion. Not depriving the defendant of the supply necessary for his property, he has, subject to that, conferred upon the plaintiff the utmost benefit of the stream. It is said, that the plaintiff has been deprived of a portion of water flowing exclusively on his own premises, and known by the name of the Ash Mill stream. It seems to me, that if that be a consequence of the arbitrator's award, it is a consequence which was within his authority. He was empowered to regulate the supply from the Park Ponds; and if in carrying that regulation into effect, he found it necessary to divert the course of the Ash Mill water altogether, it would not have vitiated his award. But he has given no express direction on the subject. A great deal has been urged upon this point; but it appears to me to be no objection whatever. With respect to the filling up of the ponds, the arrangement adapted to that contingency appears to have been devised with great intelligence; and if the event shall take place, I hope it will not be without its effect: but certainly this is not the time when we are called upon to decide ultimately upon that point.

HULLOCK, B. :

With respect to the first objection, I am decidedly of opinion, that it entirely resolves itself into merits, because the arbitrator finds a decided right, and then goes on to regulate how it shall be exercised in future by both parties. One party says that the adjudication is inconsistent; but this appears to be a mere objection to the judgment and opinion of the arbitrator. Upon

the subject of the second, the depriving the plaintiff of the use of the Ash Mill water, which was not a matter in difference, I am not so clear. But I would humbly submit, that the way in which that objection is to be got rid of is this. The Ash Mill *water exclusively belonged to Mr. Winter at the time of the reference. The right conferred upon the arbitrator was to regulate the use and flow of the water which flows through and from certain ponds in Sir T. Lethbridge's park. This was the only water which was placed under his controul. But the authority committed to him in respect of this, necessarily and incidentally gave him a power to deal with other rights of the parties; and if the use of this water in the manner in which he sees it fitting to direct, be incompatible with some former right possessed by either, that right must be taken *sub modo*. The reference was as to the right and future use of the water claimed in the action; and the award is (the Ash Mill water not being mentioned in it,) entirely confined to that. Mr. Winter says, "in regulating the stream in dispute, the arbitrator has exercised another power which is prejudicial to me." If it be so, that power must be taken to be a consequence and result of the larger power. In my view of the subject, that is the ground upon which this part of the award must be sustained. The third point arises out of the prospective regulation concerning the stream of water, that shall arise after the ponds shall have been filled up. In that respect, it appears to me that the award is bad; and that it was not within the arbitrator's jurisdiction to make an award upon that part of the subject. Looking to the order of *Nisi Prius*, the only authority given to the arbitrator was to regulate the flow of "the water claimed in the action," as it was at the time of the reference; and that is described in the declaration and the award to be "a stream of water flowing through and from certain ponds." Therefore, the moment the ponds are filled up, the subject matter of the reference is destroyed. The arbitrator, in my view of the case, had no power to decide that those ponds might be annihilated, because every one knows that there is a great difference between a stream coming from a reservoir, and from a small source. *Therefore, I think Mr. Winter would be justified in saying that that was a contract into which he did not

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enter; because the stream of water, concerning which the arbitrator was to adjudicate, was a stream running through and from two ponds, whereas he had taken upon him to permit one of the parties to fill up one or both of those ponds. However, it is not necessary to give a decisive opinion upon this point; because even if the award were bad in that particular, it would not vitiate the former part, which is unobjectionable; and as long as things remain in their present state, there is no objection to this part. Should the contingency provided for happen, then will be the time to raise that question; at present, I defer to the opinion of the rest of the Court.

Rule discharged.

EXCH. TRINITY TERM.

1824.
June 29.

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KITCHEN *v.* KNIGHT.

(McClelland, 373—376.)

A. being possessed of a portion of a lammas field, over which a right of common existed part of the year, took down the customary post and rail fence containing gaps through which the commoners' cattle might pass, and built a wall, with a single doorway, at which they might enter and return: Held, that this was an encroachment. One farthing damages will sustain the verdict for the plaintiff in an action of trespass.

DENMAN, C. S. had obtained a rule to shew cause why a new trial should not be granted, on two grounds; first, that the verdict was contrary to evidence; and secondly, the misdirection of the learned Judge.

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The action was brought for the disturbance of a right of common, belonging to the free burgesses of the town of *Nottingham, and was tried at the late Assizes, before Mr. Baron Garrow and a special jury, when a verdict was returned for the plaintiff, with one farthing damages.

It appeared that the *locus in quo* was part of the lammas fields, which were commonable from Lammas to All Saints' Day; that formerly it had been inclosed with a post and rail fence, with several gaps, through which cattle might pass; and that they

might also put their heads under the rails, and crop the grass growing there; that it had always been used as a wood-yard; that defendant had built a wall in the place of the former fence, leaving only one door-way or passage large enough for cattle to pass in singly, and that they could not go in so conveniently as they were accustomed to do, before the wall was erected. It was admitted that the plaintiff was a householder, paying scot and lot, and entitled to right of common.

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Clarke, N. G. now shewed cause :

He contended, it was evident that there had been an encroachment on the part of the defendant. Before the wall was built the cattle could put their heads through the rails to eat the grass, and the soil also upon which it was built was productive for their use. It was true, that fences were put up in other parts of these lammas fields, but they were prostrated in commonable time. If, however, the defendant's wall were permitted to stand, the whole might be covered with walls, by which the right of the cattle, to range over the whole, would be destroyed. They could so range over the part in question when the wood fence was standing, from the number of gaps that were in it; they could not now; and as the commoners were prevented, according to the averment in the declaration, from enjoying their right of common in the ample manner they had been used and accustomed to do, the plaintiff was clearly and legally entitled to the verdict he had obtained.

Denman, C. S. contra :

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The defendant being owner of the land, had a right to put up whatever boundary or fence he pleased. It had formerly been a slab or boarded fence. It was objected at the trial, that the enjoyment of the sun and air by the common was obstructed; to which it was answered, that parties have a right to protect their own property and interests, though in so doing they may necessarily affect the rights of others a little. He admitted, that if cattle could have got through the new fence as they did through the fence erected formerly, they would not be trespassers; but on the other hand, it was shewn that the place had been

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enjoyed as a carpenter's yard as long as there was any proof of the enjoyment of a commonable right over it; and therefore the right of the defendant to put up a sufficient defence was as ancient as the plaintiff's right of common; and both rights might still be enjoyed; for there was a door in the wall through which the cattle might pass at the proper season. It might be, that a minute interest had been abridged, because the cattle could not crop the grass under the fence, as it was alleged they had formerly done: and upon this the learned Judge told the jury, that if any right had been abridged, they must find for the plaintiff. Now, he contended, that the abridgment of the right in this instance was too minute for legal cognizance, and its enjoyment incompatible with the exercise of the defendant's right to protect his property by a boundary wall upon the scite of the old fence; and he had not gone beyond it. This point had not been sufficiently put to the jury by the learned Judge; and he maintained, that if it had been urged upon them, as he contended it ought to have been, they would, in all probability, have given the defendant a verdict, as it was clear they had some difficulty in making up their minds upon the question; for they were several hours in deliberation.

GRAHAM, B.:†

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I can perceive no ground in this case *to disturb the verdict. It has been pressed in argument that it was not sufficiently put to the jury, that the wall did not extend beyond the line of the old fence. Now that fact appears clearly in all the evidence, without the slightest contradiction; and therefore it was not necessary that the learned Judge should urge it upon them, for they could be under no mistake upon that part of the case. It appeared from the evidence that there were gaps in the fence in former times, through which the cattle could range at their pleasure: now, they certainly could not do so through a brick wall. In addition to this, as the soil upon which the wall was built cannot now produce any grass, which it did produce when the railed fence existed, it is impossible to say that there has not been an abridgment of the right of common.

† The Chief Baron was engaged in the Exchequer Chamber.

GARROW, B. concurred.

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HULLOCK, B. :

If this verdict were to bind the right in question for ever, by fixing it upon the present record, I might wish to give the subject a little more consideration before I delivered my opinion, though I do not apprehend I should arrive at any other conclusion than that the verdict ought to stand : but the defendant may try the question again, by conducting himself as he has done before, without our granting a new trial in the present instance. As to the argument founded upon the minuteness of the infringement of the common right, the case of *Pindar v. Wadsworth*, 2 East, 154,† is sufficiently in point, where it was held that a farthing damages will sustain an action of this sort.

Rule discharged.

MAXWELL AND OTHERS v. WARD.

(McClelland, 458—468 ; S. C. 13 Price, 674.)

1824.
June 22, 23,
28.*Exchequer
Chamber.*
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Covenant in a lease for perpetual renewal, upon notice within one year next after the death of any or either of the life or lives: informal notice about five years after the dropping of the first life, with an allegation of accident, and ignorance of rights, and a regular application after the determination of the second and third lives, both within one year ; lessee held not entitled to a renewed lease, determinable on either three, or two lives, with a similar covenant, but bill retained for a year, with liberty to bring an action at law.

Ignorance of a party's own rights, or of instruments in his possession or power, in no way occasioned by the adverse party, cannot excuse a non-performance of any thing incumbent on that party to perform.

Questions upon the construction of covenants are the same in equity as at law.

THE defendant being seised in fee of certain premises at Bath, by lease, dated 25th March, 1792, demised the same to Edward Maxwell Brown, his executors, administrators, and assigns, for the term of ninety-nine years, if the lessee, Edward Candler, and Edward Phineas Maxwell, or any of them, should so long live, at the yearly rent of 2*l.* 5*s.* subject to the following covenant, amongst others, "that if said E. M. Brown, his executors,

† 6 R. R. 412.

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administrators, or assigns, should at any time or times thereafter, upon the death of any or either of the life or lives, by which the said demised premises were then held, be desirous to renew his, her, or their estate and interest in said premises, by adding a new life or lives in the room of the person or persons so dying, and of such desire should give notice in writing, to, or for said defendant, his heirs and assigns, within one year next after the death of any or either of said person or persons for whose life or lives said premises were then held, that then, and in such case, said defendant, his heirs and assigns, should and would, at the costs and charges of said E. M. Brown, his executors, &c. at any time within the space of one year next after the death of such life or lives, sign, seal, execute, and deliver, or cause or procure to be signed, &c. to said E. M. Brown, his executors, &c. one good, &c. lease of the premises, for a new term of ninety-nine years, to be determinable on the death or deaths of such said life or lives thereinbefore *mentioned as should be then in being, and the life or lives of such other person or persons as the said E. M. Brown, his executors, &c. should nominate, in the room of the life or lives so dying, under the like yearly rents, covenants, provisos, conditions, and agreements, to all intents and purposes, *mutatis mutandis*, as were in the same indenture contained, and so *toties quoties* as any life or lives should die, and said E. M. Brown, his executors, &c. should be desirous to renew his, her, or their interest therein," upon payment of a fine of 4*l.* 10*s.* for each life to be added, and other conditions therein specified.

E. M. Brown died in February, 1803, having by his will, dated 21st April, 1795, given all his leasehold hereditaments whatsoever to E. P. Maxwell, his executors, administrators, and assigns. And E. P. Maxwell having been appointed executor (with another person, who died in the life time of the testator) duly proved the will, and became the sole legal personal representative of E. M. Brown, and also beneficially entitled to the said estate.

The second of the lives mentioned in the indenture dropped in August, 1817.

E. P. Maxwell died in February, 1818, having by his will, dated 22nd April, 1807, appointed his wife, Frances Maxwell,

W. Gilpin, and James Fisher (since deceased), his executrix and executors, and (after certain pecuniary bequests) he bequeathed all the residue of his personal estate, which included these leasehold premises, and the benefits to be derived under the lease, to his executrix and executors, and the survivors and survivor of them, upon certain trusts.

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The lease never having been renewed, the object of the present suit was to obtain a renewal. The bill was brought by the widow of E. P. Maxwell, two new trustees of his estates, nominated pursuant to a power in his will, in the places of the two former, and W. Gilpin, against G. B. Ward, the lessor. In addition to the facts mentioned, it *stated (by way of amendment) that for some time after the death of E. M. Brown, and until the year 1808, the indenture of lease had been lost, mislaid, or overlooked; and that early in that year it was sent for custody, by E. P. Maxwell, to his solicitor, at which time the former was, and always before had been, ignorant of the fact, that E. M. Brown, was one of the lives named in it, and of the right and conditions of renewal therein contained. But that his solicitor, shortly after he received, or first saw the indenture, perused it, and discovered such right and conditions, and that he, on making such discovery, apprized E. P. Maxwell thereof, and soon afterwards, by his direction, applied to the defendant and his solicitor, and requested a renewal, by the substitution of a new life in the place of the said E. M. Brown, deceased; upon which a correspondence took place between the respective solicitors of the parties, in which the circumstances aforesaid, and the cause of delay in making the application, were stated and explained, and offers were made by E. P. Maxwell to fulfil all the conditions of such renewal by several letters written by him to the opposite solicitor; but after various affected delays and excuses on the part of the defendant, he finally, in the year 1810, refused to make such renewal: and that E. P. M. having been advised that it was doubtful whether he could enforce such renewal, without having required the same within twelve months from the death of E. M. Brown, but that he would have and retain his right of renewal as to the two remaining lives, did not think it expedient, until one of such remaining lives should drop, to raise any question

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by suit at law, or in equity, as to his right of renewal in respect of the then expired life.

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It also stated (originally), that on the expiration of the third life, before a renewed lease of the premises had been granted, W. Gilpin, Frances Maxwell, and James Fisher, having become entitled to a renewal of the lease, upon the terms contained in the indenture, on the 6th of April, 1818, *caused a notice in writing, duly signed by them, to be delivered to defendant, stating the deaths of the three cestui que vies, and that they were desirous to renew their estate and interest in the premises demised, by putting in the full complement of lives allowed by the indenture, and agreeably to the true intent and meaning of the covenant for that purpose; and that they proposed three persons therein particularly described as cestui que vies, in the room of those deceased, and required the defendant to grant them forthwith a new lease, thereby offering to pay the stipulated fines, and to execute all other necessary conditions. It further stated, that the defendant had not only refused compliance, but had commenced an action of ejectment for recovering possession of the premises.

The bill charged, that under the circumstances stated, the provisions contained in the indenture of the 25th March, 1792, as to the renewal of the lease, had been fully complied with on the part of the lessee, and his representatives and assigns. And it prayed a declaration, that plaintiffs were entitled to a perpetual renewal of the lease, by the insertion in the indenture of lease thereafter prayed to be executed, and in all future indentures, of a covenant, in the same or the like words with the covenant for such purpose, and to such effect, in the indenture before set forth; and from time to time, and so often as any persons or person named as lives, or a life, in such indentures should happen to die, to have renewals, or a renewal, in respect of such expired lives, or life, by the substitution of other lives, or another life, in the place of such expired lives, or life. It also prayed, that the defendant might be decreed to execute to plaintiffs, F. Maxwell, C. S. Birch, and C. Pilkington, a new or renewed lease, according to the true intent of the covenant for that purpose contained in the indenture, for the term of ninety-nine

years from the death of E. P. Maxwell, determinable with the lives proposed, and the life of the survivor, subject *to such rents, covenants, and provisions as in the former indenture were particularly mentioned ; or if the Court should be of opinion that the said plaintiffs were not entitled to have such new or renewed lease executed to them, with three lives named therein, then that the defendant might be decreed to execute a good lease for the same term from the death of E. P. Maxwell, determinable with two of the lives proposed, and the life of the survivor, subject to such rents, &c. as before mentioned, plaintiffs offering in every way to fulfil the provisions, &c. in said indenture of 25th March, 1792, contained, on the part of the lessee, his representatives, and assigns ; and in the mean time, and until such lease should be executed, that the defendant might be restrained from prosecuting his action of ejectment, &c.

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All the material facts were admitted, or proved by one witness, or by documents ; but the defendant, in his answer, alleged that the benefit of the covenant for renewal had become wholly forfeited and lost. He also alleged, that E. P. Maxwell had died before any application for a renewal, except that before mentioned, was made after the death of E. M. Brown. He submitted to the judgment of the Court, whether, under the circumstances stated, the provisions contained in the indenture of the 25th March, 1792, with respect to the renewal of the lease, had been fully complied with on the part of the lessee, his representatives, or assigns ; and whether, on the contrary, E. P. Maxwell did not wholly neglect to comply with the same, by not having made a proper application to defendant for a renewal of the lease in due time, viz. within one year after the death of E. M. Brown, pursuant to the terms and conditions of the covenant ; and whether, in consequence of such neglect, C. S. Birch, C. Pilkington, and F. Maxwell, or any, or either of them, were, or was then entitled to have it renewed to them on the terms specified in the notice.

An injunction had been granted, the common order *nisi* for dissolving which had been discharged by the late Chief Baron, after argument ; and the injunction continued till the hearing.

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The cause now came on for hearing, and was argued by *Martin, H.* and *Bligh*, for the plaintiffs; and by *Jervis* and *Palmer*, for the defendant.

The cases cited by the former, were *Seton v. Slade*,† *Jackson v. Saunders*,‡ *Lennon v. Napper*,§ *Furnival v. Crew*,|| *Willan v. Willan*,¶ *Iggulden v. May*,†† and *Cook v. Booth*.‡‡ Those relied on by the latter, were *Rubery v. Jervoise*,§§ *Bayley v. The Corporation of Leominster*,||| *Baynham v. Guy's Hospital*,¶¶ and *Eaton v. Lyon*†††; but *Rolfe v. Harris*,‡‡‡ and *Bracebridge v. Buckley*,§§§ were also mentioned.

June 28.
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The cause was directed to be put in the paper for judgment on this day, and it was now given accordingly.

THE LORD CHIEF BARON (having first stated the case):

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The first point discussed in the argument was whether the equitable circumstances disclosed in the pleadings, and the depositions, entitled the plaintiffs to the same relief in Equity, by the insertion of a new life in the lease, in respect of the first of the lives which dropped, exactly as if E. P. Maxwell had made an application for that purpose according to the plain terms of the covenant. The ground upon which it was endeavoured to establish that position was this: that it was through accident and ignorance only *the application was not made in the manner required by the provision; and that the delay had been fully accounted for and excused, by the circumstances appearing in evidence. Now, these circumstances amount to nothing but this—that the original lessee dying, the instrument in question was left in the possession of E. P. Maxwell, or of some persons in trust for him; but that he was ignorant of that fact, and of E. M. Brown being one of the lives named in it, and of the right and conditions of the renewal,

† 6 R. R. 124 (7 Ves. 265).

‡ 1 Sch. & Lef. 443.

§ 2 Sch. & Lef. 682.

|| 3 Atk. 86.

¶ 16 Ves. 72.

†† 9 Ves. 325.

‡‡ Cooper, 819.

§§ 1 R. R. 191 (1 T. R. 229).

||| 3 Br. C. C. 529; 1 Ves. J. 476.

¶¶ 3 R. R. 96 (3 Ves. 295).

††† 3 Ves. 690.

‡‡‡ 2 Price, 206, n.

§§§ 2 Price, 200.

until he was apprised of them by his solicitor in the year 1808. And it appears to me, that there is not the least foundation for the argument. It is quite clear, that ignorance of a party's own rights, or of instruments in his possession or power, an ignorance to which the adverse party is in no way auxiliary, cannot excuse a non-performance of any thing incumbent on that party to perform. Therefore, I put that out of the question; and it was not strongly insisted on.

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Then, no proper application having been made upon the dropping of the first life, but an application having been duly made within the terms of the covenant, after the falling of the second, the question comes to be, whether that circumstance entitles the plaintiffs to the benefit of a renewal for the two lives; that is, whether the demand made on the death of the second life, gives the parties a claim to a renewal for the first. Now, my original opinion was, that these questions upon the construction of covenants, were the same in equity as at law; and that has been confirmed by every thing which has occurred to me on the subject in the course of my inquiries. The rule of construction is the same on both sides of Westminster Hall. Undoubtedly this is a covenant for perpetual renewal; and such a covenant, with only two lives, would be better for the lessee than one with three; because he might be always sure of a renewal upon the proper application, and would be liable to fewer fines. But considering the cases, and the *terms of this covenant together, I think it clear, that the requisition made on the expiration of the second life does not confer a right to have the first renewed. However, the parties having complied with all the conditions of this covenant upon the determination of the second life, and upon that of the third likewise (but I fix my attention particularly on the former fact,) the question which I am next bound to dispose of is, whether these parties are, or are not, in a situation to insist upon a renewal of the second dropt life; and if they should be successful in that, of the third, notwithstanding their omission on the dropping of the first. I consider that to be an extremely nice and difficult question; and if it had come before me, without having been previously settled by any Court, I should not feel inclined to dispose of it myself,

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but I should put it into some form for the consideration of a Court of Law. But it appears to have been already decided in one case, and in one only: *Eaton v. Lyon*; for I am not able to discover any broad, clear, intelligible ground upon which I can distinguish the point determined in it from the present. None of the other cases mentioned seem to go to that point. I shall refer to them very briefly. *Rubery* and *Jerroise* appears to be quite a different case from this, and to have but a very remote bearing upon it. The next, *Bayley v. The Corporation of Leominster*, is one of great importance, because Lord Alvanley thought it exactly like that of *Eaton v. Lyon*; so much so, that if he be truly reported, he decided the latter on the authority of it. However, they are not exactly the same; for the language of the covenant there was, "that they and their successors, when and as often as either of the said three lives should die, and there should be only two lives remaining in the premises," and so on. This expression, "that there should be only two lives remaining," prevents that case from coming up to either *Eaton v. Lyon*, or this: and though I think with Lord Alvanley, that it is in some degree an authority, yet *I cannot say that it is not a stronger case against a renewal. The third case cited was *Baynham v. Guy's Hospital*; and I cannot perceive that that has any relation whatever to the decision in *Eaton v. Lyon*: it is completely distinct from it. There it was perfectly clear, that the dropping of one life, without an application to renew, must have deprived the lessees of all right of renewal; because there is a subsequent provision annexed to the covenant for renewal, which is, that if the lessee, his executors, or administrators, do not apply within the time specified, all the articles and clauses of the covenant were to be null and void. The consequence was, that, they not having complied with that condition, the instrument was at an end, with all its provisions and covenants; and the lessor might have re-entered the moment the breach was committed. Therefore I look upon that to be a very clear case against a renewal, and one which would not justify me in the course I propose to take. The next authority brought before me was *Eaton v. Lyon*, which, I think, in effect, governs this case; and I cannot

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say otherwise, without contradicting what Lord ALVANLEY said and did in it. The covenant there was, "that the said G. Hockenbulla, his heirs or assigns, would, at the decease of any of the life or lives aforesaid, at the request of the said D. Orred and S. Orred, or at the request of the survivor of them, &c. grant a new lease of the said premises thereby demised, and add one more life or lives in the room of the life or lives so dying." Now those terms, and the terms of this covenant, seem to me in substance precisely the same. The words here are, that the lessor, &c. should and would, at any time within the space of one year next after the death of any such life or lives, execute a good lease of the premises. The phrase, any such life or lives, refers to, and is to be construed by a preceding part of this instrument, which states, that if E. M. Brown, his executors, &c. should, at any time thereafter, upon the death *of any, or either of the life or lives by which the said demised premises were then held, &c. So that the only difference between the two covenants is, that the expression in one of them is "any" only, and in the other it is "any or either"; and that does not make any difference in effect. I think that "any" imports the same thing as "any or either"; and that they both mean, that upon the death of any one of these lives, the acts provided by the covenant should be done. Certain facts, mentioned in the report, happened in *Eaton v. Lyon*, which shewed a clear intention of renewing; so that if any thing turned upon that circumstance, it was a more favourable case for a renewal than this is. But Lord ALVANLEY considered that it was a pure question upon the construction of a covenant; and so I think here. I will not go through the reasoning in that case; it amounts to this, that the question is purely one at law; that there is no difference between the construction of covenants at law and in equity; and that the true meaning of a covenant so expressed is, that notice must be given upon the expiration of the first life; and not having been given there, Lord ALVANLEY dismissed the bill. The only circumstance (in addition to what I have already mentioned) which distinguishes that case from this is, that in that there was a covenant on the part of the lessee to give notice, in

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consequence of which notice the lessor covenanted to grant a lease. If that makes any difference between the two cases, it seems to be rather a difference in favour of this lessor ; because in that case the lessor had the remedy in his own hands. Upon the non-application he might have proceeded upon the covenant, to compel the lessee to accept a renewed lease. Consequently, it seems to me, that the power which the lessee there gives to the lessor, to insist upon a renewal, rather weakens than strengthens the argument for these plaintiffs, inasmuch as it put the lessee to a strict performance of the covenants. I am of opinion besides, that there is a great deal of expediency *in holding men to a diligent enforcement of their rights ; and that great inconveniencies may ensue, if persons are to lie by for a length of time, and are then permitted to do what the other party supposed would never be done. Lord ALVANLEY's construction seems the most convenient in practice for the conduct and arrangement of the affairs of mankind. Accordingly, I should feel myself bound to dismiss this bill ; but I consider this a very nice question, and on that account I will give the plaintiffs the advantage of retaining the bill for twelve months, to enable them to take the opinion of a Court of Law, by bringing an action for the breach of the covenant, or any other they may be advised.

His Lordship afterwards added, that he had laid the Irish cases entirely out of the question ; because it was clear, from the Act of Parliament,† and its history, that they were founded on local equity.

Bill retained for twelve months, with liberty to the plaintiffs to bring an action, but if no action brought within that period, bill dismissed without costs.

† Irish Tenantry Act, 19 & 20 Geo. III. c. 30.

EX PARTE WILLIAMS.

(McClelland, 493; S. C. 13 Price, 673.)

1824.
June 26.

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A person of the age of sixteen is competent to enter into a recognizance conditioned to prosecute on a criminal charge; and if it be forfeited and estreated, the Court will not discharge it, unless a sufficient case for relief be made out.

OWEN, *SIR W.* moved to discharge the recognizance of this petitioner, which had been forfeited for non-attendance to prosecute an individual at the assizes at Maidstone, according to the condition, and estreated; on the ground, amongst others, that he was only of the age of sixteen at the time of entering into the recognizance about four years ago, and that being an infant he ought not to be held bound by it.

But the COURT was of opinion that a person of that age did not come within that privilege of infancy, and that it was due to the justice of the country to enforce the performance of the obligation: and thinking that the affidavit did not disclose a sufficient cause for relief,

They refused the order.

CUPIT v. JACKSON.†

(McClelland, 495—505; S. C. 13 Price, 721.)

1824.
June 29.
July 5.*Eschequer
Chamber.*ALEXANDER
C.B.

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A bill by an executrix for payment of nine years' arrears of an annuity, charged by deed upon real estate, due to her testator, the grantee, to be raised by sale or mortgage, held to be well brought, and relief decreed accordingly; notwithstanding an alleged verbal discharge supported by loose evidence of the defendant's sister, herself originally a defendant; and although by the provisions of the deed the plaintiff might have distrained, or probably had an action of debt, or distress, under the stat. 32 Hen. VIII. c. 37.

In cases the most unfavourable to equitable relief, wherever any difficulties embarrass the legal remedies, the courts of equity interpose with their more effectual forms.

By the marriage settlement of Thomas Brailsford the younger, and Elizabeth Jackson, dated the 6th and 7th September, 1778, John Jackson the elder, in consideration of the intended marriage,

† Followed in *White v. James* 179; *Horton v. Hall* (1874) L. R. (1859) 26 Beav. 191; 28 L. J. Ch. 17 Eq. 437; *Scottish Widows Fund*

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and for other considerations, conveyed certain estates of the yearly value of 106*l.* to trustees, to the use, intent, and purpose, as to part of the premises, that he the said J. Jackson the elder and his assigns, should and might, yearly and every year, during the term of his natural life, have, receive, and take by and out of the same premises, one annuity, clear yearly rent, or sum of 45*l.*, free and clear from all taxes, charges, and deductions whatsoever, parliamentary or otherwise howsoever, to be paid to him the said J. Jackson the elder and his assigns by two equal half yearly payments, that is to say, on the 25th day of March, and the 29th day of September in every year. And to this further use, intent, and purpose, that Hannah, the wife of the said J. J. the elder, and her assigns, in case she should happen to survive him, should and might, yearly and every year, during the term of her natural life, have, receive and take by and out of the said messuages, &c. one annuity, clear yearly rent, or sum of 30*l.*, clear of all deductions whatsoever, the same to be accepted and taken by her as the residue of her jointure, and in lieu, bar, and satisfaction of her dower: and which said annuity should be paid and payable to her the said Hannah, and her assigns, on the two days before mentioned in every year, by even and equal *portions. And to the further use, intent, and purpose, that in

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v. *Craig* (1882) 20 Ch. D. 208; 51 L. J. Ch. 363; *In re Tucker, Tucker v. Tucker*, '93, 2 Ch. 323; 62 L. J. Ch. 442. And compare *Kelsey v. Kelsey* (1874) L. R. 17 Eq. 495, 500; *Taylor v. Taylor* (1874) L. R. 17 Eq. 324, 328; *Sandeman v. Rushton* (1891) 61 L. J. Ch. 136; *In re Herbage Rents Greenwich, Charity Commissioners v. Green*, '96, 2 Ch. 811, 816; 65 L. J. Ch. 871, 876.—R. C.

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any, or every part or parts thereof, to enter and distrain ; and the distress and distresses then and there found to take, &c. and impound, and in pound to detain, keep, or otherwise to sell and dispose of the same according to law, until thereby or therewith they, or their assigns, should be fully paid and satisfied, the said respective annuities, &c. as the same should become respectively due and payable, and all arrears thereof, and all costs, charges, and expences attending such entry and distress ; and also, in case the said respective annuities, or either of them, or any part of them, or either of them should be in arrear, in part, or in all, for the space of six weeks, that then, and as often as the case should so happen, it should be lawful for the annuitants, and each of them respectively, their, and each of their assigns, into, and upon the said messuages, &c. to enter, and the rents, issues, and profits, thereof to take, and receive to his, her, or their own use and benefit, until he, she, or they should be thereby or therewith, or otherwise, fully satisfied and paid the said several respective annuities, &c. and all arrears thereof, &c. “And to this further use, intent, and purpose, that in case the said then intended marriage should take effect, and he the said T. Brailsford the younger, should happen *to survive the said E. Jackson, his then intended wife, then he the said T. Brailsford the younger, should and might, yearly and every year, during so long time as he should happen to live, and continue a widower and unmarried from and after the decease of the said E. Jackson, his then intended wife, and no longer, have, receive, and take, by and out of the said messuages, &c. one annuity, yearly rent, or sum of 60*l.* free and clear from all taxes, charges, and deductions whatsoever, parliamentary or otherwise howsoever, which said annuity, yearly rent, or sum of 60*l.* should be paid and payable to him the said T. Brailsford the younger, and his assigns, on the 25th day of March, and the 29th day of September in every year, by even and equal portions ; the first payment thereof to begin, and be made on such of the said days of payment as should first and next happen after the decease of the said E. Jackson, his then intended wife, with such powers and remedies for recovering and obtaining the said annuity, yearly rent, or sum of 60*l.* by entry, distress, or otherwise,

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as was, or were thereinbefore given and reserved to them the said J. J. the elder and Hannah his wife, or either of them, for recovering of their respective annuities."

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The marriage took place, and the husband survived the wife. The settlor having been, previous to the death of the latter, in the possession of the premises charged with the annuity of 60*l.*, or having entered into them on his daughter's death, continued to enjoy them, and to pay the annuity to T. Brailsford the younger, during the remainder of his life. Hannah Jackson having died in March, 1778, J. J. the elder in 1780, or 1781, intermarried with Elizabeth Searson, and the issue of that marriage was two children, John Jackson the younger (the defendant), and Elizabeth Jackson. J. J. the elder, died in June, 1808, leaving these two children surviving him, and having by his last will, and a codicil, given and devised (amongst *other things) the settled estates charged with the payment of the said annuity, to the use of his son, his heirs, and assigns for ever. Accordingly, J. J. the younger, paid the annuity from the testator's death up to Michaelmas, 1812: but it remained unpaid from that period. Thomas Brailsford the younger died in April, 1820, without having married a second time, and the arrears of the annuity due at that time amounted to 450*l.* By his will, dated the 26th of December, 1806, he bequeathed the yearly interest and profits of the residue of all his personal estate to his servant Mary Cupit (the plaintiff) for her life, and appointed her his sole executrix: but by a codicil, dated February 2nd, 1811, he revoked the prior disposition and appointment, in case she should at any time after his decease marry. The bill was brought by the executrix, who had complied with the condition expressed in the codicil, in December, 1821, against J. J. the younger; and originally against Elizabeth Jackson also, but it was subsequently dismissed by the plaintiff against her. It contained various charges, enforcing the facts mentioned; and it prayed an account, and payment of the arrears of the annuity, and that the amount might be raised by the sale, or mortgage of the premises charged therewith, or a competent part of them.

The defendant, by his original answer, admitted the death of T. Brailsford the younger, and the provisions of his will as set

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forth in the bill, and the payment of the annuity up to Michaelmas, 1812. But he stated, that at the time he made the last half-yearly payment, viz. on the 13th November, 1813, being then with his sister on a visit at the house of the testator, the testator at first refused to accept payment of the arrears then due, and upon being prevailed upon by defendant to do so, declared in the presence and hearing of defendant's sister, that he would take the annuity up to that time only, but that defendant need not send, or pay any more money on account of it, *but he might keep the annuity from Michaelmas, 1812, and all payments in respect of it for himself, as he (T. B.) would not accept, or call for any further payment of it. He averred, that in fact the testator never would accept of any further payment of the annuity, but suffered him (defendant) to enjoy the estates charged therewith free from all demand or payment on account of it; and that the said annuity remained unpaid to the testator by reason of his having released the defendant from all payment on account of it; for that not only upon the 13th day of November, 1813, but frequently afterwards, defendant offered to pay the arrears, but the testator always refused to accept, and freely and voluntarily forgave, and released the defendant from the payment of, all arrears due, and from all and every future payment in respect of the annuity. He therefore submitted that he was not liable to pay the alleged arrears. By his answer to the amended bill he contended, that in any event the plaintiff was not entitled to recover any part of the arrears, which had become due more than six years before the filing of the bill, he never having promised any payment; and he claimed the same benefit of the Statute of Limitations as if he had pleaded it in bar. Elizabeth Jackson was the only witness examined on the part of the defendant. She stated that she was present on two different days in November, 1813 (neither of them the 13th), on the first of which defendant told the testator he was come to pay the annuity; when the latter said "never mind it;" and that on the second day, the offer having been repeated, he replied, "well, I will receive it this time, but don't bring it any more." She further deposed, that she and the defendant went on a visit to the testator, at his house, in August, 1815; in the course of which,

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testator asked the defendant if he had brought the annuity ; and on the defendant answering in the negative, said, “you have done right, it will be useful for you ;” and that she had not heard of any subsequent demand being made upon the defendant relative to the annuity.

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Jervis and Martin, J. for the plaintiff, contended that she was entitled to recover the whole arrears : for, 1st. The evidence did not disclose an unqualified renunciation of interest. 2nd. If it did, it was surrounded with such circumstance of suspicion, that it ought not to be made the foundation of a decree. 3rd. Admitting declarations of a purpose to relinquish the claim to have been unequivocally delivered, and satisfactorily proved, still being by parol, and without any consideration, they could not amount to a release of a charge upon land created by deed. *Byrn v. Godfrey*,† *Heathcote v. Crookshanks*.‡ *Wakett v. Raby*,§ was distinguished by its circumstances from the present case. 4th. The debt was not barred by the Statute of Limitations, because it arose out of a rent-charge, upon which the statute was no bar at law, and consequently would not be adopted in equity : *Aston v. Aston*,¶ *Earl of Pomfret v. Lord Windsor*,¶ *Stackhouse v. Barnston*.†† In the last case, Sir W. GRANT said “ There is no Statute of Limitations to bar a legal rent-charge. Therefore, in equity such a bar is never permitted to prevail.∴

Martin, H. and *Temple*, for the defendant, argued, that if the plaintiff had any remedy, she had misconceived it in coming into equity ; for wherever there was a clear course of proceeding at law, that ought to be pursued in the first instance ; and from the nature of this deed, the plaintiff might have proceeded by action, or a distress upon the premises. If an account of the sum due were necessary to be taken, that circumstance might give this Court jurisdiction ; but the party had precluded herself from asserting that, by the allegation that the arrears were due

† 4 R. R. 155 (4 Ves. 5).

‡ 2 T. R. 24.

§ 3 Br. P. C. 16, ed. 1780.

¶ 1 Ves. Sen. 264.

¶¶ 2 Ves. Sen. 472, 482.

†† 10 Ves. 453. [This, of course, relates to the law as it stood before 3 & 4 Wm. IV. c. 27.—R. C.]

‡‡ 10 Ves. at pp. 466, 467.

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from Michaelmas, 1812, to the death of the testator. The plaintiff *had no right to come into equity to enforce payment, not out of the rents and profits of the estate, which alone had been charged with the annuity, but out of the corpus of the estate, which had not been made liable to it. If the rents and profits had only amounted to 50*l.* a year, the annuitant could not have called for compensation out of the body of the estate; and his representative cannot be entitled to destroy the interest of the remainder-man by a sale, or impair it by a mortgage for the recovery of arrears: she must either resort to her legal remedy, or shew why it is not available. But if the Court should not concur in this reasoning, the bill ought to be dismissed, because the debt had been actually released, for the language of the testator shewed a clear intention to release; the evidence was the best which the nature of the case could afford; and the debt was in the nature of a personal demand, and releasable by parol. Neither was a valuable consideration requisite, because the demand was relinquished through affection for a nephew, and the plaintiff came in, not as a creditor, but as a volunteer. All the cases which had been cited on the other side differed from the principal one in important facts, and therefore could not govern it. If the declarations should not be thought to have the effect of a total release, at least they would operate as one up to the time of the last of them, in August, 1815. However, if the plaintiff should be held entitled to an account of the arrears, it ought not to be carried farther back than six years from the filing of the bill; for although the Statute of Limitations cannot be set up as a defence to a demand of a rent-charge, it may be pleaded in bar of a claim of arrears of a rent-charge.

Jervis, in reply, insisted, that whether an action did, or did not lie, was not a true test of the propriety of the bill. But an action could not be sustained at all, or at least not without great difficulty. The power of distress in the *deed was limited to the life of the grantee of the annuity, and conferred no authority for that purpose on his personal representative. The Statute of Limitations could not be pleaded in bar of a demand of a rent-

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charge, as appears from the language of the Act, and that of Sir W. GRANT in *Stackhouse v. Barnston*,† who said, “In *Collins v. Goodall*‡ it was held, that the statute concerns only customary rents between landlord and tenant.”

The CHIEF BARON said he had no great doubt upon the case; but as the points had been argued as if they were of importance, he wished to have an opportunity of looking into the cases.

July 5.

His Lordship now gave judgment :

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This bill is brought by the executors of one Thomas Brailsford, who was entitled to an annuity issuing out of a real estate ; and its object is to obtain payment of the arrears, which remained due to the testator at the time of his death. The bill prays, that one of the defendants, who is now the owner of the estate, may have these arrears, and that the amount of them may be raised by sale, or mortgage of the premises, or a part of them. The annuity is claimed under a deed, which was a marriage settlement, and by that there were two prior annuities granted, with powers of entry and distress. The annuity in question was given with a power of entry and distress, but without any other specification than by a reference to the powers given for the recovery of the former annuities. Several objections have been stated against granting the relief prayed. One of these is, that the testator had actually released the annuity, and the sister of the person who would otherwise be liable to it was examined as a witness to prove that fact. Perhaps that evidence might have been objected to. Probably counsel did not *object to it here, because they thought it so loose that it would not have the effect contended for. I think it ought not to have that effect. The general rule is, that if a duty be created by deed, it must be discharged by deed ; if by record, or writing, it must be discharged by record or writing. This, it is found by the books, is the rule by which the Courts have regulated themselves. Now, this is a rent-charge created by deed. A distinction has been attempted to be established between the annuity itself, or the corpus of the annuity, and the arrears ; but I cannot find any ground for such

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† 10 Ves. at p. 467.

‡ 2 Vern. 235.

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a proposition. If an annuity is granted by deed, all arrears are secured by the same deed. They do not lose their character by being arrears; and it is for the purpose of securing them, that the remedies are given. Accordingly these arrears are, in every point of view, to be considered as if they were due by deed.

It is established by one of the cases which were cited in the argument, that even a debt by simple contract cannot be discharged by parol; because that, as was stated by Mr. Justice ASHURST and Mr. Justice BULLER, is *nudum pactum*,† *a fortiori*, a debt of the present description cannot be discharged in that way. In the next place, the evidence is very loose; and the general admission of evidence of that character would be very dangerous, and might lead to great mischief. Many of the rules of law are intended for the purpose of excluding such testimony. I am of opinion, that the arrears are recoverable notwithstanding it. If this testator had thought fit to give a release, he should have done it in some form; and however strong his intention might have been, it must miscarry in consequence of his not taking proper measures to carry it into effect. Then, it is urged, on the part of the defendant, that there is a remedy at law. In answer to this, *Mr. Jervis* argued, that the plaintiff had no legal remedy, and that the power *of distress given by the annuity deed was limited to the duration of the life estates of the two original annuitants, and consequently ceased on their deaths. Upon looking at the deed, I do not think that to be the true construction of it. The power of distress annexed to this annuity was the same as that before reserved to the husband and wife, or either of them, for recovering their respective annuities. Now, the first power given to the husband for that purpose was certainly limited to his life, but the second was not so. And therefore if the question turned upon that, I should think that by the provisions of the instrument in this particular case, the party was entitled to have recourse to a distress. In addition to that, I think it possible that she might have other remedies under the statute of the 32 Hen. VIII.‡ Executors and administrators had no remedy by the common law for rents of any description. That statute gives them both an action of debt,

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† *Vide* 2 T. R. 27, 28.

‡ c. 37.

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and a distress, under certain circumstances. This is a rent-charge, and I do not know that this plaintiff might not avail herself of those remedies. Notwithstanding all that, I think that this bill is well brought. That by possibility the plaintiff might have had a remedy at law, is no answer to it. The effect of proceedings there might be very uncertain; this is a more convenient and effectual course, and generally in practice that is a sufficient ground for supporting the summary jurisdiction of this Court. I apprehend this Court has a right to raise the arrears out of the estate, if necessary, by sale or mortgage. The charge is an incumbrance upon the estate, and not merely a demand upon the owners of the inheritance; and bills for raising the incumbrance out of the estate are very usual. In the *Duke of Leeds v. The Corporation of New Radnor* (2 Brown's Chancery Cases),† which was a bill for a fee farm rent, the MASTER OF THE ROLLS refused the equitable relief; but *the LORD CHANCELLOR reversed the decree, and granted it. It is established by a great number of cases, even the most unfavourable to equitable relief, such as those of quit-rents, that wherever the least difficulties embarrass the legal remedies, the courts of equity interpose with their more effectual forms. There are many cases to that effect mentioned in the *Duke of Leeds v. The Corporation of New Radnor*, and in the case of *Pulteney v. Warren*, in the 6th of Vesey Junior.‡ In this case I should do mischief to both parties by sending them to law. The only remaining ground insisted on in arrest of a decree, was the Statute of Limitations. On that point, I shall only refer to the case of *Stackhouse v. Barnston*. That was much considered by the Bar, and reasoned at considerable length by Sir W. GRANT, and it certainly rules this. Therefore I think that the plaintiff must have a decree.

Decree according to the prayer of the bill, with costs.

† Pp. 338, 518.

‡ 5 R. R. 226.

EXCH. MICHAELMAS TERM.

IN THE MATTER OF HOOPER.

(McClelland, 578—581.)

Where the Court refuses to discharge a recognizance, they have power to mitigate the penalty.

1824.
Nov. 19.

*Exchequer of
Pleas.*

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IN the year 1820, the petitioner had been bound before two magistrates of Worcester, in a recognizance of 40*l.* to prosecute four persons whom he had caused to be apprehended on the charge of stealing a fowl, and did not attend at the Quarter Sessions pursuant to his undertaking; in consequence of which his recognizance became forfeited, and was estreated into this Court. Process had issued to the Sheriff a short time back for the levying of the penalty, and it had thereupon been paid into his hands.

Sir W. Owen moved this morning before the single Baron (Mr. Baron Hullock,) to discharge the recognizance on an affidavit stating, that the fowl having been taken in the day time by the persons charged, in a field where they were reaping; that one of them having been very young; and that they having been all admitted to bail, the petitioner had, on consideration, looked upon the matter not as an offence committed with a felonious intent, *but as a mere frolic, and had therefore not appeared to prosecute. The affidavit further stated, that the petitioner was not in good circumstances, and that he had paid the 40*l.* only to prevent the taking of his goods.

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Mr. Baron HULLOCK desired that the application might be made before the whole Court, and when the Court was full, the motion was renewed; but

All the Barons were of opinion, that the grounds laid for discharging the recognizance were wholly insufficient, and refused the motion.

In the
matter of
HOOPER.

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Sir W. Owen then said, that a writ of Privy Seal† was *issued at the commencement of every reign, which empowered the Barons in all cases to discharge, mitigate, or compound all forfeitures, recognizances, penalties, fines, &c. and moved that the Court, in the merciful exercise of the powers thus conferred upon them, would mitigate the penalty.

† The writ is as follows: “George, &c. to the Commissioners of our Treasury, and the Chancellor, and Under-Treasurer of our Exchequer, now being, and, &c. for the time being; and to the Barons of our Exchequer at Westminster, now, and for the time being; and to all other, the officers and members of our said Exchequer now being, or that hereafter shall be, to whom these presents shall or may appertain, greeting. Whereas many of our subjects are, or hereafter may be, chargeable unto us with the forfeitures of recognizances, penalties, fines, issues, and amerciaments, and other sums of the nature of recognizances, &c.; such as our royal predecessors, by their several letters of privy seal, have generally authorized to be discharged, mitigated, or compounded, which by the rigour of the law, and course of the Exchequer, are, or may become, due and answerable unto us, although in good conscience and equity, some of them ought to be discharged, mitigated, or lessened, and yet processes do, or may, issue for the whole, to the great burthen and oppression of many of our good subjects, which our will and pleasure is shall be remedied: and for that some scruple hath heretofore been made, that many of the said forfeitures, &c. could not, by the Commissioners of the Treasury, Treasurer, Chancellor, Under-Treasurer, or Barons, be discharged, or mitigated, without direction under the privy seal, which would prove tedious and chargeable

to many of our loving subjects, and troublesome to us amongst our weighty affairs, to hear, and answer petitions made to us in such cases: wherefore out of our princely care for all our subjects, we do, by these our letters, signify unto you, that we are not minded to take advantage of the penalties and forfeitures of any of our loving subjects, in any of the premises, which, by the rigour of the law, and course of the Exchequer we might; but contrariwise, our will and pleasure is, that all our subjects who have already fallen, or may fall into any penalties, or forfeitures, by any occasions happening in our said Court of Exchequer, or which are, or shall be estreated into our said Court of Exchequer from any other Courts, or Commissioners, shall be discharged, or mitigated, according to the truth or equity of their respective cases, or causes. And we do therefore give power unto you, the Commissioners of our Treasury, &c. and Barons of the said Court of Exchequer, as aforesaid, and to our Attorney General for the time being, or to any two or more of you, that when, and as often as any person or persons shall make their suit or suits, petition or petitions unto you for relief, in any of the aforesaid forfeitures and penalties, or for any other forfeitures and penalties within the intent and meaning of these presents, the case of such person or persons being fully demonstrated to you by the Remembrancers, or other the officers of the said Court to whom it doth appertain, that in equity

The COURT referred to the Lord Treasurer's Remembrancer's Deputy, as to whether there were precedents for this course; and he having certified in the affirmative, they ordered the penalty to be mitigated to 20*l*.

In the
matter of
HOOPER.
[581]

*Motion to discharge the recognizance refused, but the
penalty mitigated.*

and good conscience they are to be relieved, according to the intention of these presents, that then our said Barons, by narration in open Court, do discharge the person so petitioning for of the pains, penalties, and forfeitures charged upon him or them respectively, as to you shall seem requisite; or that any two, or more of you, upon a full declaration made in writing unto you by the said Remembrancers, or other the officers aforesaid, of the true state and matters of the said petitioners for relief of such pains, &c. either do discharge the said party or parties of the said debt, duty, or demands, or else do mitigate or compound the same. And our pleasure is, that the said party or parties paying the sum so by you, as aforesaid, mitigated, or compounded, to our receiver that shall be appointed for that purpose, or otherwise into the receipt of our Exchequer; and upon producing the said receiver's acquittance, or a tally of the sum so compounded, shall be discharged of the said forfeitures, penalties, or pains charged upon him or them; and for so doing, these our letters, or the enrolment thereof,

shall unto you, and all other the officers of our said Court, be full and sufficient warrant and authority. Provided always, that these our letters of privy seal, or any thing herein contained, shall not extend to take away, or abridge any authority that our said Barons of our said Court of Exchequer, or any member thereof, now have, or ought to have to estall† debts upon reasonable considerations, or to discharge amerciaments set upon a sheriff or sheriffs, or any other person or persons, at any time before such debts or amerciaments shall be drawn down, and charged in the Great Roll of the said Exchequer, or any other act or thing heretofore done, and to be done for the necessary discharge and dispatch of suitors having any thing to do before them, anything in these presents to the contrary notwithstanding. And these our letters shall be your sufficient warrant and discharge in this behalf. Given under our privy seal at our Palace at Westminster, the 11th day of April in the first year of our reign."

† For an explanation of this term, *vide* Gilbert's Treat. on Exch. 80, 81.

1824.
Nov. 27, 29.

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ON TWO WRITS OF IMMEDIATE EXTENT.

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(McClelland, 688—703; McClelland & Younge, 250—253; S. C. 13 Price, 826.)

An affidavit for an immediate extent in chief against a bond-debtor to the Crown, should contain a distinct, positive, and unequivocal allegation of a breach of the bond; therefore where the allegation of the breach in the affidavit was ambiguous, an extent, issued against one of the obligors in a bond to the Crown, was set aside; and the Sheriff ordered to deliver the goods to the assignee under a commission of bankruptcy sued out after the *teste* of the extent.

A second extent having subsequently issued upon a sufficient affidavit: Held, that the assignees were entitled to the property, although the sheriff had not, at the time of the *teste* of the latter extent, actually delivered the goods according to the order of the Court.

JOHN MILBOURNE MARSH, upon his appointment to the office of Deputy Postmaster-General of the island of Jamaica and its dependencies, and William Marsh (the defendant), and a third person, as his sureties, entered into a bond bearing date the 7th April, 1809, to his late Majesty, in the penal sum of 8,000*l.*, upon the following, among other conditions: that if the said J. M. Marsh, at all times during his continuance in that office, should, from time to time, call to account all the deputy postmasters, and all other officers, and persons, appointed, or employed, and to be appointed, or employed under him at the said island, or any other island or islands dependent thereupon: and take, collect, and receive of the said deputies, and officers, and all persons whatsoever, to his Majesty's use, all such monies as should arise, be made, had, or received, or which ought to be received, for the post of all letters and packets received in, and forwarded from the said island, and its dependencies: and if the said J. M. Marsh should and would well and truly account for and pay unto the Receiver-General of the Post Office for the time being, at the General Post Office in London, for the use of his Majesty, all such sums of money as should from time to time be received by him, or by those employed under him, for the post of letters and packets, or in any other manner by virtue of his said office, then the obligation to be void, otherwise, &c.

A *fiat* was granted by GRAHAM, B. on the 14th of September,

1824, for a writ or writs of immediate extent *against William Marsh for the sum of 8,000*l.*, the penalty of the bond, under which two writs were issued. The affidavit, upon which this order was grounded, after reciting the conditions of the bond, proceeded as follows: “and this deponent, Charles Newton, for himself saith, that the said J. M. Marsh, as late Deputy Postmaster-General at Jamaica, is now justly and truly indebted to his Majesty in the sum of 9,988*l.* 14*s.* 1*d.*, on balance of his accounts, for the postage of divers mails of letters sent to him as such Deputy Postmaster at Jamaica from the General Post Office in London.” The affidavit then alleged applications to the defendant for payment of the balance, and stated, that he was one of the partners in the firm of Marsh, Stracey, & Co. of Berners Street, Oxford Street, bankers, which firm had on the 11th September instant stopped payment, and was according to the deponent’s belief, insolvent; and that the debt was in danger of being lost, &c.

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Jervis, for the defendant, and the assignees under the commission of bankruptcy, had obtained a rule on a former day in this term, requiring the Attorney-General to shew cause why the *fiat*, and writs of extent, and all proceedings had under the same, should not be set aside. The rule was moved for on the grounds, that the allegations of the affidavit did not necessarily imply a breach of the condition of the bond;—that it did not appear thereby that application had been made to the principal for payment;—or that he was in decayed or insolvent circumstances. But the case of *The Attorney-General v. Resby & al.*,† having been referred to by HULLOCK, B., on the original application, as an express authority against the last point, and the Court generally now intimating a strong opinion that the rule could not be supported on the second ground, they were both abandoned by defendant’s counsel.

The Solicitor-General and Clarke, N. G. showed cause. * * *

Nov. 27.

Jervis and *Parke* in support of the rule. * * *

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† Hardr. 377.

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The *Solicitor-General*, in reply. * * *

ALEXANDER, C. B. :

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The case has been very strongly argued : on the part of the Crown nothing has been omitted which could be stated with advantage. It seems clear, that it is absolutely necessary in this proceeding upon *a bond to shew on the affidavit a clear breach of the bond. It is not sufficient to shew, that by possibility, on further investigation, there might turn out to be a breach ; but the matter must be so stated, that from the fair construction of the language it will necessarily amount to a breach. And the true question in this case is, whether by collating this bond and this affidavit together, it does appear from the latter that there must necessarily have been a breach of the former. In order to decide that question, I take it that I am at liberty to refer to the course of business in the Post Office. I do not mean to say, that I am to take what has been stated on this part of the subject as fact ; but only that in enquiring whether this affidavit does, or does not contain a clear asseveration of the nature I have mentioned, I may refer to that which has been stated as being the mode of transacting business at this office, and see whether the affidavit would not be all true if it referred to this course of proceeding exclusively, in which case there would be no clear breach of this bond. It has been said, that it is the course of the Post Office, to keep an account against the Post Masters at the colonies, and to charge them immediately on the dispatch of each mail with the postage of the letters which that mail is to convey ; and that they are charged with that in the Post Office books as with a debt. Now if it be true that the charge in question has been made against this gentleman upon that footing, although the affidavit may be all true, it seems to follow necessarily that it does not contain the averment of any breach of this bond ; because in that case, the charge would be made against him, not upon that which is expressed in the condition of this bond, not upon the actual receipt of the letters, and of the postage upon those letters on their delivery to the several persons to whom they were addressed, but upon the

dispatch of the mails from the General Post Office. I have not yet adverted to the argument, that the particular language of *the affidavit does amount to this, that the account is stated by the person who made the affidavit upon the hypothesis of its being an account rendered by the accountant abroad, which necessarily supposes the actual receipt of these monies by him. If this were the necessary construction of the affidavit, I should certainly accede to the argument on the part of the Crown. But is that the case? If it be a possible construction, it may be that which he meant. But is it, or is it not, when you are taking so strong a measure as the issuing an execution against the person and property of the subject—is it, or is it not, I repeat, sufficient that the affidavit should contain that which by possibility may constitute a charge against him, or must the statement of the charge be clearly, and unequivocally expressed? It does not appear to me that the argument upon the word “his,” is entitled to all that force to which, in the argument on the part of the Crown, it is supposed to be: because really, in common language, the account kept at the Post Office against this gentleman, by the mode of proceeding to which I alluded, would be considered as his account. If you were to go into a merchant’s counting-house, and a question were to arise respecting the balance due by him to an individual, or by an individual to him, it would be obvious to say in either case, “look into the ledger to his account.” It appears to me, that according to the common understanding of the words “his account,” the acceptance of them so strenuously insisted on on behalf of the Crown, although a very possible, is not at all the necessary meaning of them. I am of opinion, that this affidavit does not contain a distinct asseveration, that any breach of the bond has been committed; and therefore that the application on the other side ought to succeed.

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GRAHAM, B. :

After the opinion which the LORD CHIEF BARON has given upon this case, and knowing likewise *that of the only other Judge present,† I have a very great reluctance to say any thing,

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† Garrow, B. was sitting at Nisi Prius, for the Chief Baron.

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even like the inclination of an opinion of my own. I am quite sure, that I shall be exempt from the suspicion of any zeal to support an act which has had the sanction of my own name; because I should myself be the first to acknowledge, that I might, probably, when I was applied to in a moment of hurry and alarm, have read over this affidavit without that strict attention which is on such occasions desirable. I am influenced very much by the magnitude of this subject. On the one hand our decision excludes the Crown for ever from recovering this demand; on the other, if the condition has never been broken, it would be perfectly competent to the parties who resist the claim of the Crown to obtain a further, and a full discussion of the subject. Something perhaps may be expected from one who has sat so many years in this Court; but however that may be, I cannot forbear; indeed I think it part of my duty, to explain myself a little upon the case.

The condition of this bond is perfectly plain. This gentleman, being appointed Deputy Postmaster-General of Jamaica, enters into this obligation, the condition of which, so far as it relates to the present question, is simply this, that he is bound to account for all such sums of money as he may receive for the postage of letters, or otherwise in his character of Deputy Postmaster of that island. The question, on the present occasion is, whether there is a reasonable ground, that is, a reasonable ground taken up from this affidavit, to suppose that the condition of this bond has been broken by his having actually received money which he has not brought into account. And when I say a reasonable ground, I derive my opinion from that clause of the statute,† which is the foundation *of our authority upon the present occasion, and which has particular words, giving a power to the Court to issue as to its discretion shall seem meet, process of extent in cases where need shall require for the recovery of the public money. When an affidavit of this sort is brought to a Baron to see whether there is probable ground disclosed there for saying that the King's debt is endangered, it cannot be expected, and particularly in those instances where the fate of vast property may depend on the lapse of an hour, or

† 33 Hen. VIII. c. 39, s. 55.

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sometimes of a much shorter space, that it should be examined with very great accuracy. Then what is to be done in a case of this sort? The person who alone can check and understand the accounts of this Postmaster must depend on the account transmitted from Jamaica to this country from time to time: an affidavit is presented to the Baron, stating all that is necessary to constitute the state of things contemplated by the statute: the material part of the present one is in these terms “and this deponent Charles Newton for himself saith, that the said J. M. Marsh, as late Deputy Postmaster-General at Jamaica, is now justly and truly indebted to his Majesty in the sum of 9,988*l.* 14*s.* 1*d.* on balance of his accounts for the postage of divers mails of letters.” Now there is no account between these two parties, except that charge for postage on the one hand, and the entry of the receipts of the postage on the other. Undoubtedly it fell from me, though where I collected it, I do not exactly know, unless it was from the clerk when this case was originally opened, that probably the course of the Post Office was what has been stated; and it is clear from that course, (supposing it to be that which is in fact pursued), and from the construction which is now more properly, I think, put upon the language of this affidavit, that there is some equivocation in it, which, I believe, has formed a very considerable part of the ground of argument upon which my LORD CHIEF BARON has rested his opinion. But the question *is, what is the fair construction of this affidavit according to the terms of it. This person undertakes to swear that the Deputy Postmaster is justly and truly indebted to his Majesty in the sum of 9,988*l.* 14*s.* 1*d.* on balance of his accounts. Now can a man be supposed to swear that merely because he has *ex parte* charged the other with a certain sum for postage? That is not a fair way of understanding it. Can the Baron who is called on for his *fiat*, understand it in that sort of way? This man is the correspondent; it is his duty to check the accounts which are transmitted from time to time from the person in Jamaica. He looks to those accounts that are so transmitted to him, he sees the charge against, and he sees the return of, the person who lives abroad, and upon those two compared he ventures to swear positively that the person is indebted to the

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King in the sum of 9,988*l.* for the postage of letters. Then if he is indebted to the King in that sum for the postage of letters, he must have received them. Even taking the other view of the case, and supposing that this affidavit is to be understood as stating a debt merely shewn by a charge for mails which had been sent out, and of which no return had been made; I should doubt very much whether I were not bound to consider even that as sufficient to render the party liable to this proceeding. I agree that there is some degree of difficulty in it, but the difficulty arises from the construction which we are required to put upon the affidavit, viz., that this is an *ex parte* charge of the individual here.

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If this affidavit had stated, that the mails were sent out at such a time, and a longer period than that within which the return ought to have been made, according to the course of the Post Office, had elapsed, and there had been no return, I have no doubt that that would be sufficient, taking it for granted, that before the letters had been delivered abroad, the postage of them had been received. *But I do not think it a fair way of construing this affidavit, to consider it to be an *ex parte* charge, but that it is to be understood as taken from an account given in by this individual, whereby he appears to be indebted to the King in the amount sought to be recovered; and I look upon that to be a fair and reasonable ground for a Baron to act upon when he is called upon to put his name to a *fiat*. I do think there is that in this case, which did authorise me to sanction the hands of the Crown being laid upon this property. It is a mistake to suppose that by this step the property is absolutely swept away; the Crown only lays its hands upon it, and then all proper claims to it are capable of being put upon the record, and fully discussed. The question, which was before the Baron, and which is now before the Court, is, was there under the circumstances of this case, a fair, probable, and reasonable ground to suppose that there was a debt due to the Crown by the infraction of this bond, enough to leave the question open to further discussion, and enough to give the Crown in the first instance, the benefit of this process. And therefore, in the view I take of the case, and with the notions which I have collected from time to time, in the

course of my long experience in this Court, I feel it my duty to say, that I, for one, do think there was a fair ground to grant a *fiat* for an extent, and that the affidavit is sufficient to justify it.

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HULLOCK, B. :

I think that this affidavit does not contain a sufficient allegation of the debt. I acknowledge that in these cases a Baron is often placed in very delicate and embarrassing circumstances ; and in a similar situation, where I had a doubt upon the subject, I issued the *fiat*, telling the party that I thought the debt was not sufficiently established ; but afterwards my opinion was set right by the Court.

I apprehend, that in order to justify this proceeding, *which affects the person of the party, and the whole of his property ; by which the one is imprisoned, and the other put into a state of jeopardy for the moment, there ought to be a debt, a demand existing at the time, stated distinctly and unequivocally upon the affidavit. I take it, that it is not sufficient to say there is a probability, from its statement, that a debt will appear to be due to the Crown upon further investigation. And if I were to draw any inference from the manner in which this affidavit is framed, I should suspect, that the course of the office which has been suggested may be the reason why it has been so framed. If, in fact, it was a debt upon the balance of an account rendered by the party, would it not have been said, “upon the balance of an account furnished by him?” But it is sufficient for the Court, in my judgment, to say that this affidavit is ambiguous ; and I think that the protracted arguments which we have heard this day (I do not mean to say improperly protracted), upon the supposition that it may be construed in three different ways, shew that it does not contain that strictness and precision which ought to belong to a document of this nature. But the question is not, whether the affidavit taken *per se* be a good, or a bad one. This is not the case of a proceeding where the party against whom it is directed is indebted to the Crown, as the receiver of the Crown’s money, or in any similar way ; but it is a proceeding against the party for the breach of an obligation into which

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he has entered for the conduct of his principal. By much the greater part of the argument has been applied to this affidavit *per se*, taking it up as a substantive basis for a proceeding to hold a party to bail, independently of the bond.

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The single question is, does this affidavit disclose a breach of the bond? Down to the time of *The King* in aid of *Atwood v. Tarleton*[†] there was a notion, that it was not necessary for the purpose of obtaining an **extent*, to assign a breach of the bond. But I, for one, confess, that that doctrine when it was suggested, startled me considerably, because all that the Act of Parliament, which has been alluded to, does, is to authorize the Baron in awarding the extent, to exercise his discretion upon the solvency of the debtor. The words are “and every such several suit and suits shall be made, &c., by *capias*, *extendi facias*, &c., if need shall require, or any of them, or otherwise, as unto the said several Courts shall be thought by their discretions expedient for the recovery of the King’s debts.” This language does not go upon the probability, or improbability of the existence of the debt. That is assumed; you must be satisfied of that fact, before you can, under the statute, have recourse to the remedy afforded by it. Now it was the Act of Parliament which was considered as entitling the party to adopt the proceeding, without stating a breach of the bond, and shewing a debt. That practice was, however, set right in the case I have mentioned. Then, it being the known and recognized law, that you are to shew the existence of a debt before you can resort to the process of extent; the consideration is, what act ought to be done to make it appear that there is a debt demandable upon a bond. It can only be by assigning a breach of it, and the question comes round again, is there a breach assigned here? The first part of the condition of the bond is, for the due accounting at the General Post Office here, of the Deputy Postmasters, and other officers in Jamaica; for it seems this gentleman resides in this country, and has deputies there. And the part of the condition upon which this affidavit affects to assign a breach is this, “and if the said J. M. Marsh shall, and do well and truly account for, and pay unto the Receiver-General of the revenue of the Post Office for

[†] See note p. 758, *post*.

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the time being, at the General Post Office in London, for the use of his Majesty, all such sums of money as shall, from time to time, be received by him, or by those employed *under him for the post of letters and packets, or in any other manner by virtue of his said office of Deputy Postmaster-General as aforesaid," then the bond is to be void. Now the object of this affidavit is to shew that a breach of the bond has been committed by the party's not accounting for all such sums of money as have been received by him, or by those employed under him; but it contains no allegation of the sort, and it appears to me quite clear, that it may be true in every word, and yet that the condition of the bond may not have been broken by this gentleman; and it is upon a breach of the bond alone that this proceeding is sustainable. It seems strange that there were not materials to enable the person who made this affidavit to go further than he has ventured. It is evidently not framed by him, but by some professional man, who could hardly have failed to know in what way the debt is stated in an affidavit to hold to bail, in actions analogous to this case, where the allegation is that the party is indebted on an account settled between the plaintiff and defendant. Or if that would not have answered, and if this be an account received from Jamaica, he would have said, "as appears by the account stated by him the said principal." But this is the way he puts it; "and this deponent C. Newton for himself saith, that the said J. M. Marsh, as late Deputy Postmaster-General at Jamaica, is now justly and truly indebted to his Majesty in the sum of 9,988*l.* 14*s.* 1*d.* on balance of his accounts;" for what? not for the postage of letters *received* by him, but "for the postage of divers mails of letters *sent* to him." *Non constat*, but that those letters may have been sent a month ago, and may be now on their passage, on the high seas, for he does not say when the mails were sent out. Now I would ask any individual, whether in the ordinary construction of the English language that allegation does not properly and directly apply to letters sent out in *some mail*, no matter whether recently, or at *a distant time; whether that postage is not to be understood to be the postage of letters charged in some account, kept by the General Post Office here, between that office and the individuals

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to whom those letters have been sent out. My impression is, that every word of this affidavit may be true, and yet that there may be no breach of the bond; and if that be so, it is no answer to say that there may be another hypothesis consistent with the facts there stated. It does appear to me from the opinion I have formed upon this subject, and it is not an opinion which has been lightly taken up, (for in consequence of what took place on another occasion, I felt it to be my duty to look with some attention into the subject); it does, I say, appear to me, so far as my humble judgment goes, that there ought to be upon the affidavit a distinct and positive allegation of a breach of the bond, and that this affidavit has not assigned a clear breach, and is therefore insufficient.

Rule absolute.[†]

Nov. 29.

Clarke, N. G. applied that the rule might be opened, in order that the Attorney-General might be heard; but the COURT said, that the application was unprecedented, and refused it.

1825.
Feb. 23.
SITTINGS
AFTER
HILARY
TERM.

THE KING v. MARSH.

ON A WRIT OF EXTENT, TESTED 29TH NOVEMBER, 1824.

(McClelland & Younge, 250—258.)

[McClel. & Yo. 252]
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IN the afternoon of the day on which the order above mentioned was made, another *fiat* was granted, on an affidavit *clearly stating a breach of the bond, under which two new extents, of the same *teste* with the *fiat*, were issued, of which one was directed to the Sheriff of Middlesex containing,

† [The case of *The King v. Attwood v. Tarlton*, referred to in the judgment of HULLOCK, B., p. 756, *supra*, was decided in the Exchequer Mich. T. 1821 (9 Price, 647).]

[250, n.]

The affidavit in that case was dated May 2nd, 1821, and so far as it bears upon the decision referred to was to the following effect: George

Attwood, of Birmingham, banker, maketh oath, and saith, that he, together with Matthias Attwood, sen., Isaac Spooner, I. G., T. A., and R. S., all of Birmingham aforesaid, bankers; also together with R. P., of the same place, esq., and F. R., of Stourbridge, esq., by their bond, dated the 16th March, 1820,

amongst others, a command to inquire what goods *and chattels, &c. the defendant then had on his bailiwick, and all such goods, &c., in whose soever hands the same were, to extend, and seize into his Majesty's hands, till satisfaction of the debt. This writ was delivered to the *sheriff on the 2nd December, at

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became jointly and severally bound to his present Majesty King George IV., in the penal sum of 60,000*l.*, of lawful money of Great Britain, conditioned *inter alia*, for the payment, by the said bankers, and this *deponent, to the commissioners of excise in England, for the time being, or to their order, at the chief office of excise in London, of all and every sum or sums of the King's money, which they, or any, or either of them, or any person or persons by the order, or appointment, or on the behalf of them, or either of them, should at any time or times thereafter, have, or receive of, or from, the collector, for the time being, of the excise and other duties, under the management of the said commissioners, for the Litchfield collection, or from any other person or persons, by the order or direction of the said collector, or the said commissioners, for the time being, or on his or their part or behalf, at the time, and in the manner therein mentioned, (*viz.* within 21 days after the receipt of such respective sums, by giving the collector good bills for all sums received, payable to the commissioners, or their order, within 21 days after date), which said bond, (the affidavit proceeded to state), is now outstanding, and in force, and undischarged, and is of record in the Court of his Majesty's Exchequer at Westminster. And this deponent saith, that he is now actually and *bona fide* indebted to his present Majesty in the sum of 5,724*l.*, being monies arising from his said Majesty's revenue of excise, and actually received by this deponent; and the said Matthias Attwood, sen., Isaac

Spooner, I. G., T. A., and R. S., for his Majesty's use, of and from John Ombler, esq., the present collector for the Litchfield collection, for the purpose of being remitted to the commissioners of excise in London, and for the securing, paying over, and accounting for which monies (amongst others), to his said Majesty, the said Matthias Attwood, senior, Isaac Spooner, I. G., T. A., and R. S., and this deponent, were jointly and severally bound, as aforesaid. The affidavit further stated, that Edward Attwood, and John Wilson, of London, merchants, and co-partners in trade, were indebted to deponent in 5,500*l.* on their promissory note, overdue and unpaid; that, from the information of the former, and the knowledge deponent had of their concerns, he believed those parties to be insolvent; and that the debt due to him, was in danger of being lost, &c., with the other usual allegations.

[*251, n.]

On this affidavit, a commission to find debts due to the deponent and his partners issued in the first instance, by the inquisition taken on which the debt from Messrs. Attwood and Wilson to G. Attwood was found, and seized into the King's hands.

An extent, tested the 2nd May, was then issued against Messrs. Attwood and Wilson, for the recovery of the 5,500*l.*, on a *fiat* *granted by Mr. Baron WOOD upon the commission and inquisition, reciting that that debt was exceeded by the debt due by the prosecutor of the extent, and his partners, to the Crown. An inquisition was held under the extent, on the day of its *teste*, and the jury

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which time the order of the Court had not been executed. In consequence of the receipt of the writ, the sheriff refused to part with the possession of any of the property seized, and on the 20th January, 1825, took an inquisition, pursuant to its exigency. *Parke* attended on that occasion as counsel for the

found that John Tarlton, of Liverpool, merchant, was then indebted to Messrs. Attwood and Wilson, in 4,687*l.*, which was seized into the King's hands.

Upon this extent and inquisition, and affidavits of the issuing of the former, and the finding thereunder, and of the existence of the debt of 4,687*l.*, and the insolvency of Tarlton, a *fiat* for another extent against Tarlton was obtained from the same Baron, which was issued on the 3rd May, and dated the same day. The usual inquiry was made at Liverpool, on the 11th May, and the property found to belong to Tarlton was taken possession of by the under-sheriff.

A commission of bankrupt was shortly afterwards taken out against Tarlton, under which he was duly found and declared a bankrupt. A claim to the property was entered on behalf of him and his assignees. And on the 11th July following, *Denman*, (now) C. S., obtained an order to shew cause why the last writ of extent, and the several proceedings whereon it was grounded, should not be set aside, and quashed, with costs, for irregularity; all proceedings being in the meantime stayed. Long affidavits were sworn in support of the order, charging collusion between George Attwood and Messrs. Attwood and Wilson, and an abuse of the prerogative process, inasmuch as at the time of issuing the first commission to find debts, no part of the condition of the bond had been broken, and the extents were wholly unnecessary for securing the interests of the Crown, but had been resorted to by Messrs.

Attwood and Wilson, for their own private purposes. These affidavits were answered by others. On the discussion of the order, on the 28th July, at Gray's Inn Hall, the material objections in point of law were ultimately reduced to this, viz., the proceedings must either have been founded on a debt to the Crown by the bond or by simple contract. If on the former, the first affidavit ought to have alleged a breach of the bond, which it did not; if on the latter, there ought to have been a commission previous to the first extent, to inquire whether its prosecutors were indebted to the Crown. This was argued on the assumption, that the extent sought to be set aside was one in which the Crown was not interested. That fact was denied, and a principal ground of contention was, whether the extent was one in chief, or in aid. In consequence, the case was postponed till the following term, and the *Attorney-General*, by the direction of the Court, received notice to attend to satisfy them on that point. The *Attorney-General* attended the Court at Westminster, on the 23rd November ensuing, and disclaimed all interest in the extent on the part of the Crown, stating that there had been no breach of the condition of the bond, and that the sums of money (including the 5,724*l.* mentioned in the affidavit) paid into the bank of the obligors had been regularly remitted to London. After some further argument, the Court gave judgment on that day.

RICHARDS, C. B.:

Your duty, Mr. *Attorney-General*,

*assignees, and produced evidence of the petitioning creditor's debt, the trading, and act of bankruptcy, and of an assignment by the commissioners to the assignees, on the 5th October, and therefore insisted, that the defendant had no personal property at the *teste* of the writ, inasmuch as the assignment had taken

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as an officer of the Crown, is to take care of the public, beyond all question. This extent was taken out either on a bond or upon a simple contract debt. I conceive, from the affidavit, that it was taken out on a bond. Because a bond is stated, and afterwards there is an allegation in the affidavit, which seems to import that there had been a breach of condition. But it is not an allegation that states that breach at all. It states that the money was received. Still the condition of the bond would not have been broken, except it had been due beyond 21 days after the receipt. It appears clearly, so far as the breach of the condition is concerned, that there is no evidence to shew any breach. If, on the other hand, it is to be considered as an affidavit stating a simple contract debt, in that case, there must be a formal inquisition. Under all the circumstances, I am of opinion that this extent cannot stand.

GRAHAM, B.:

I am quite clear in my opinion, that it is an extent, irregular on the face of it, the moment it takes the denomination of an extent in aid. I shall follow the example of my LORD CHIEF BARON, and not enlarge on this subject. Nothing is more clear, as it appears to me, than that this extent varies from every practice. All the extents in aid before the statute, (if I have a knowledge of this proceeding,) have stated, as their groundwork and basis, a claim due to the Crown, and that founda-

tion is always laid by a commission to find debts and credits to the Crown. Then, if the person applying for the extent in aid, be amongst those who are debtors to the Crown, from that moment he derives his title (his title being that he is a debtor to the Crown,) to this process of an extent in aid. Then comes this statute,† which does most clearly except this particular case, if followed up with all its circumstances. The statute, anxious to secure the Crown in respect of persons like these parties, receiving large sums of *money, from time to time, meant to permit the extent in aid in that particular instance. That clause, leaving the common law as it was before, says, that if a person is indebted to the Crown by simple contract, and he, with others, is bound to the Crown to account for money so received, in that case the party shall sue out the extent in aid. But the meaning of the Act is, that the extent cannot be prosecuted independently of the Crown,—that the party may use the privilege of the Crown, but the Crown in that case is the party, in the first instance, concerned. Let us look at the circumstances of this case; there is a bond for the regular accounting to the Crown, for the payment of certain sums of money. The Crown says, we have no fault to find with these persons; they received 5,000*l.* from one 21 days to another, and they have regularly accounted to us before the end of 21 days; we do not wish to disturb them or call on them.

[*254, n.]

† 57 Geo. III. c. 117, s. 4.

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place previously, by which it was wholly transferred to the assignees. But in consequence of the property not having been reduced into the possession of the assignees, but having continually remained in the under-sheriff's custody, under the seizure on the first extent, at the suit of the Crown, that officer

[*255, n.]

Well, but then, the simple contract debtor is to account to the debtors of the Crown, and they say, 'we will not issue an extent for debts and credits,' attempting to ground the extent against their debtor only on the evidence of this affidavit. But, supposing it had gone on to state an actual breach, the party cannot sue on the Crown debt when the Crown says—'nothing is owing to us,'—it is carrying the privilege too far, and in a way that might be injurious. In every case for the benefit of the Crown, if the creditor is really agreed to be indebted to the Crown,—in order to resort to the original creditor, the Crown will very readily give its extent, and it will issue in the formal terms. But it ought to be preceded by a commission to find debts and credits. In the case of an extent in aid, as the foundation of such extent in aid, it must appear that the Crown has issued an inquisition to find debts and credits. Taking this view of the law of the subject, I am of opinion that this extent is irregular.

Wood, B.:

I am of opinion, that this proceeding is irregular, for this is an extent in aid, sued out on the foundation of a simple contract debt, due to the Crown. Now, in cases of this sort, there are, besides the debt that may be due to the Crown, bonds given to the Crown, conditioned for the payment from those persons who receive sums of money from the Crown. And in such cases there are two courses of proceeding. The Crown may proceed as for its original

debt, the moment the money is received. But when the Crown proceeds for the original debt, the moment it is received, and before the breach of the condition of the bond, there must be an affidavit that it is actually due, and it must be put on record, and there must be an inquisition to find debts. Now here a person sues out an extent in aid; *and he cannot have that extent, unless the Crown's proceeding be right. But before the Crown could have proceeded on this simple contract debt, there must have been an inquisition. How can it be contended that the debtor to the Crown, who is only to be aided in order to enable him to pay the Crown's debt, shall be in a better condition? He must have an inquisition to find a debt due to the Crown: and this fails in that respect: there has been no inquisition to find a debt due to the Crown. It is perfectly irregular in that respect. Suppose it was a proceeding on the bond; (if the Crown proceeds on the bond, it is already on record; if for the other debt, it must be put on record by inquisition). If the Crown proceeds on the bond, which is on the record, you must take the bond and the condition together. Until an actual debt becomes due to the Crown, and the condition is broken, there can be no extent issued on that. If it were otherwise, it would be strange indeed, because the consequence of that would be, that if a bond were given to the Crown, payable two years hence, according to this account, they would have a right at once to sue out an extent in aid upon that. You must take the

doubted whether the Crown might not be entitled to it by virtue of a lien. Accordingly, the jury, under his advice, found, that on the 29th November last, certain goods and chattels, and other effects, of the value, in the whole, of 5,147*l.*, had been, and on the day of taking the inquisition were, in the custody of the Sheriff of Middlesex; which said goods, &c., on the 14th September, 1824, were the proper goods, &c. of the said defendant; and on the said 14th September were seized into his Majesty's hands, by virtue of his Majesty's (former) writ of extent, tested the same day, and inquisition duly holden thereon by the late Sheriff of Middlesex, which extent and inquisition were filed of record in the Court of Exchequer; and which said goods, &c., were delivered by the late to the present Sheriff, and remained in his custody till the receipt of the (present) extent, and from thence hitherto; the jurors further found, that on the 16th September, 1824, a commission of bankrupt had duly issued against the said defendant, and his co-partners in trade, under which they were duly declared bankrupts, and that an assignment of all their estate was executed on the 5th October, 1824, to assignees duly chosen. They further found, the proceedings instituted in this Court, touching the first extent, and their result, with the other special matter; and that the

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bond and condition together, and see if that condition has been broken. It does not appear that the condition of the bond has been broken, because the *Attorney-General* says, that the payments have been regularly remitted, and he complains of no breach whatever. Therefore it is clear, that this extent cannot stand.

GARROW, B. :

We have been reminded, that if there is any doubt, the Court ought not to venture to decide the case in the present form of application, but put it in a course by which any error we might commit, might be considered elsewhere. If I thought the case susceptible of doubt, I should be very much influenced by that argument, and be ready to adopt

the advice so repeatedly given to us. But on the other hand, I concur with my LORD CHIEF BARON and brothers, that there is no doubt in the case. And not adopting that, which some of the arguments seem to have assumed, that an extent is of no inconvenience to the party,—and not thinking that the creditor has not a deep interest in the subject, or that it is of no consequence to interpose delay; I am bound to avow my opinion, that the extent is irregular, and that it ought to be set aside.

Order absolute.

The above summary is taken from MS. notes, procured since the publication of the former part of the principal case.

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sheriff had detained and seized the goods, &c., into *his Majesty's hands, pursuant to the command of the second extent, subject, nevertheless, to the legal claim of the assignees under the commission of bankrupt, and the order of the Court of Exchequer.

This inquisition was duly returned into the Court.

Parke, on the part of the assignees, had obtained an order in last term, on the ground taken before the jury, calling on the *Attorney-General* to shew cause why the Sheriff of Middlesex should not withdraw from the possession of the effects, and deliver up the same to the assignees ; and why a writ of *amoveas manus* should not issue for that purpose (if necessary) ;—and for staying all proceedings under the extent, in the mean time.

The *Attorney-General* now shewed cause :

He admitted that if all the facts were correctly stated in the inquisition, the rule ought to be made absolute : but suggested that there was some infirmity in the commission of bankruptcy, and that consequently the property had not been changed by the assignment. Therefore, he argued, the assignees should be put to claim property, by which means the question of fact as to the validity of the commission would be introduced on the record, and be regularly tried by a jury. In answer to a question by *HULLOCK, B.*, he stated that he had no affidavit.

Jervis, in support of the order, contended, that it was sufficiently proved by the finding on the inquisition, that the effects had belonged to the assignees, at, and previously to, the *teste* of the extent, and not to the bankrupt, of whose property only the writ required a seizure : and that an affidavit in support of the allegation on the other side was indispensable, before putting the assignees to claim.

[*258] The Court assenting, and stopping *Parke*, who was with *Jervis*, directed the

Order to be made absolute.†

† The same order was made respecting the other extent, which had been directed to, and executed by, the Sheriff of Kent.

K. B. (AT NISI PRIUS.)

FLUCK *v.* TOLLEMACHE.†

(1 Car. & P. 5—6.)

1823.
Dec. 10.

[5]

A father is not bound to pay for clothes furnished to his son, without some contract, express or implied, on his part to do so.

THIS was an action of assumpsit for clothes supplied to the defendant's son, who was a cadet at Woolwich.

The evidence for the plaintiff proved the delivery of the clothes to the son at Woolwich, but that the defendant lived near Uxbridge, and the only evidence to connect the defendant with the transaction, was a letter which he had sent to the plaintiff's attorney.

It stated that he had ordered no goods of the plaintiff, and would not pay for any supplied to his son; and that if the plaintiff lost money by allowing a boy of fifteen to run up a bill, he could only blame himself.

BURROUGH, J.:

An action can only be maintained against a person for clothes supplied to his son, either when he has ordered such clothes, and contracted to pay for them; or when they have been at first furnished without his knowledge, and he has adopted the contract afterwards: such adoption may be inferred from his seeing his son wear the clothes, and not returning them, or making at, or soon after the time, when he knows of their being supplied, some objection. Here the only knowledge that it appeared the defendant had of the transaction, was being asked for the money, he then repudiated the contract altogether. It would be rather too much, that parents should be compellable to pay for goods that any tradesman may, without their knowledge, improvidently trust their sons with.

His Lordship then directed a

Verdict for the defendant.

† An otherwise similar case of *evidence of the father's knowledge: Rolfe v. Abbott* (1833) 6 C. & P. 286, verdict for defendant.—F. P. was left to the jury, there being some

1823.
Nov. 29.

TULLAY v. REED.†

(1 Car. & P. 6.)

[6]

If a person enter a house with force and violence, the person whose house is entered may justify turning him out (using no more force than is necessary), without a previous request to depart. But if the person enter quietly, a request to depart is necessary before turning him out.

THIS was an action for assaulting and beating the plaintiff, in which the defendant pleaded the general issue; and a special plea of *molliter manus imposuit*.

Evidence was given of the assault on the part of the plaintiff; and evidence in support of the special plea was given on the part of the defendant.

PARK, J. :

Laid it down as clear law, that if a person enters another's house with force and violence, the owner of the house may justify turning him out, (using no more force than is necessary), without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without a previous request to depart.

Verdict for the defendant.

1823.
July 18,

BATE, WIDOW, v. HILL.

(1 Car. & P. 100—101.)

Stafford
Assizes.

PARK, J.

[100]

Witnesses cannot be cross-examined to facts not in issue, if such facts are injurious to the characters of persons not connected with the cause.

In seduction cases the plaintiff's counsel may call witnesses to the general good character of the party seduced, if her character has been attacked in cross-examination.

THIS was an action for seducing the plaintiff's daughter. In cross-examination, the daughter admitted, that she was on intimate terms with a Miss Atkinson. The defendant's counsel wished to ask whether Miss Atkinson had not had a child. This question was held improper by PARK, J., who said, that Miss Atkinson, being in no way a party to this cause, he was bound to protect her character from attacks of this sort.

† *Polkinhorn v. Wright* (1845) 8 Q. B. 197, 15 L. J. Q. B. 70.

The whole of the cross-examination went to shew, that the plaintiff's daughter had conducted herself immodestly towards the defendant before the seduction, and that she kept improper company. Several witnesses were then called on the part of the plaintiff, to prove the general good character and modest deportment of the plaintiff's daughter, and the general respectability of the family.†

BATE
HILL.

The defendant called no witnesses.

[101]

Verdict for the plaintiff, damages 50l.

BARKER v. TAYLOR.

(1 Car. & P. 101—102.)

1823.
July 19.

[101]

Guardians of a female under age are justified in stopping her elopement, and in detaining her clothes if she has eloped; and a carrier by whom she has sent the clothes is justified in delivering them up to the guardians.

THIS was an action of trover for a box of clothes, brought by Elizabeth Barker, who sued by *prochein ami*.

† This controverts the case of *Dodd v. Norris*, 3 Camp. 519,† where Lord ELLENBOROUGH ruled, that witnesses, to shew the general good character of the daughter, could only be called, if her character had been attacked by witnesses called for the defendant, to prove her general bad character; but if her character was only attacked in her cross-examination, the plaintiff's counsel were only entitled to set it right by her re-examination, and not to call witnesses to give her a good character: and in that case, her character having been attacked only in her cross-examination, Lord ELLENBOROUGH refused to allow witnesses to be called by the plaintiff's counsel in favor of her general character. The course allowed by Mr. Justice PARK in the present case is much more conducive to the attainment of justice; for it can signify very little, whether the daughter's

character is attacked by witnesses, or by cross-examination; and if it is right in one case, where it is attacked, to give further evidence, so it must be in the other. Lord ELLENBOROUGH says, that it is to be set right in re-examination: this looks very well in theory. Those used to Courts of Justice well know, that if the character of a party seduced is attacked in her cross-examination, though the witness may deny the things insinuated, a jury very often believe that, though denied, there is some foundation for the insinuation, if witnesses are not called to convince them of the contrary. It is a little too much, to allow a defendant to blast the character of a person he has seduced by insinuations, and then not to allow her to clear her character by the best means in her power.

† 14 R. R. 832.

BARKER
v.
TAYLOR.

The evidence was that the defendant was a carrier; and a servant of the plaintiff's mother proved the taking the box to the defendant, who promised to deliver it as directed, which was to a milliner's in Newcastle under Lyme. The milliner proved the non-delivery, and a clerk to the plaintiff's attorney proved a demand of the box from the defendant, previous to the action. Some evidence was given to shew that the plaintiff *herself* had bought the clothes contained in the box.†

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The defence put in proof was, that the plaintiff had eloped from home, with the assistance of an attorney's clerk, whose acquaintance with the plaintiff (who was under age,) her mother disapproved of. The mother set off in pursuit of her, and on the road overtook the defendant's cart, in which she recognised the box. * * *

PARK, J., suggested a compromise, which having been agreed to, his Lordship observed, that he was decidedly of opinion that in any case where a female under age attempted an elopement with a person disapproved of by those under whose guardianship she properly was, they (the guardians) would be perfectly justified in preventing such elopement; and it was equally clear to him, that they would be justified in stopping her clothes. Being of that opinion he must have held, if the present case had not been compromised, that the carrier was guilty of no tortious conversion in delivering up the plaintiff's clothes to her mother.

A juror was withdrawn.

† In all cases of trover, the defendant must be guilty of an injurious conversion, which is usually proved by a demand of the goods, and a refusal to deliver them: but when there has been a tortious taking by the defendant, a demand is not necessary, though it is safer. *Ross v. Johnson*, 5 Burr. 2825, decides, that, if the defendant, (there a wharfinger), had unavoidably lost the goods, that

is such an excuse, as to make the refusal to deliver them not tortious. In other cases, other reasons in excuse have been held sufficient, of which the principal case is an example. [The facts of many important modern cases on trover were such that no demand was possible. Such cases were obviously not present to the learned reporter's mind in writing this note.—F. P.]

BROWN, Esq. v. GILES.†

(1 Car. & P. 118—120.)

A dog jumping into a field, without the consent of its master, is not a trespass, for which an action will lie.

1823.
July 26.

PARK, J.
[118]

THIS was an action against the defendant, for breaking the plaintiff's close with dogs, &c., and trampling down his grass in a certain close, called Bryant's close, in the parish of A., on divers days. The defendant pleaded the general issue.

The usual notice not to trespass was proved; and a witness proved, that, after the notice, he saw the defendant walking down the turnpike road, and his dog jumped into the field, called Bryant's close.

PARK, J., was decidedly of opinion, that the dog jumping into the field, without the consent of its master, not only was not a wilful trespass, but was no trespass at all, on which an action could be maintained; he should therefore nonsuit the plaintiff.

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* * * * *

GRAY AND ANOTHER v. COX AND OTHERS.†

(1 Car. & P. 184—187.)

If a commodity having a fixed value is sold for a particular purpose, and it turns out unfit, an action lies though there has been no warranty.

1824.
April 14.

[184]

THIS was an action on the case by the plaintiffs, who were ship owners, to recover from the defendants, who were copper merchants, a compensation for the loss sustained *in consequence of the defendants having sold them some copper for the sheathing of a West India vessel, which, after a voyage to Demerara and back, turned out to be unfit for use.

[*185]

† Cited by Lord COLERIDGE, Ch. J. in *Sanders v. Teape* (1884) 51 L. T. 263, 264. And see *Read v. Edwards* (1864) 17 C. B., N. S. 245, 34 L. J. C. B. 31.—R. C.

† The ruling of ABBOTT, Ch. J. in this case was overruled on motion for a new trial in the King's Bench

(1825) 4 B. & C. 108; 6 Dowl. & Ry. 200; but has since been adopted by authoritative decisions: see *Jones v. Bright* (1829) 5 Bing. 533; 3 Moore & P. 155; and *Randall v. Newson* (1876) 2 Q. B. Div. 102; 46 L. J. Q. B. 259; and see *Sale of Goods Act*, 1893, s. 14 (1).—B. C.

GRAY
v.
COX.

It appeared from the evidence of the plaintiffs' witnesses, that the price paid for the copper in question was the usual price of that which is sold to be put on West India vessels. That at the time it was put on it had no appearance of defective copper, but after the return of the vessel from her first voyage to Demerara (during which she had not met with any accident,) the copper was found to be in a very bad state; that good copper usually lasts 5 or 6 years, but this was worn so much into holes, that the vessel could not safely undertake a second voyage without repair; and that the plaintiffs, in consequence, had her re-coppered.

Gurney for the defendants:

The plaintiffs ought to be nonsuited. This action is brought on an implied warranty. It is not proved that there was any express warranty. This is not an action brought in deceit, but it is the case of sheets of copper furnished on an order, and used by the plaintiffs themselves; they had, therefore, better means of knowing its nature than the defendants. When it was put on, it appeared to be perfectly good; but the witnesses say, that a larger portion than usual was afterwards found to be defective. The law implies no such warranty as must be established to support this action. If the quality of an article be known to one of two parties and not to the other, then, indeed, the rule of *caveat emptor* does not apply, but the contrary is the case where it might be known to both. The doctrine of a sound price implying a sound horse, has long been exploded. The defendants are not manufacturers, but merely merchants. He then cited the case of *Parkinson v. Lee*, 2 East, 314,† and afterwards continued: What is it we have sold? Sheets of copper. It is not pretended that they *were not sheets of copper. No defects were discoverable by the shipwrights when they put it on, much less could the merchants discover any. It appears, that some sheets of copper, after one voyage, have been sometimes found to be corroded, and here it becomes merely a question of quantity. This is the case of a latent defect, known to neither party; and I submit, that, under the circumstances, the plaintiff cannot possibly recover.

[*186]

† 6 R. R. 429.

Campbell, on the same side :

GRAY
v.
COX.

The general rule of *caveat emptor* is so well established, that, it is incumbent on the plaintiff to shew an exception. There was a case decided in the Common Pleas, in which it was held, that if a person buys goods which are to be sent abroad, and which he has no means of previously inspecting, then there is an implied warranty that those goods are marketable. But the case here is very different. How can this case be distinguished from that of a person going into a shop and buying a pair of gloves, or a hat? or of a person buying a horse? Now, with respect to the quantity, if one sheet would not maintain the action, neither will a large number. Here is no express promise, and if there is any at all, it must be an implied one. It seems, there were a great number of defective sheets. The bill of parcels is, in this case, the only evidence of a contract, and that shews merely, that copper was sold.

ABBOTT, Ch. J. :

I think, at present, it is not a case for a nonsuit. My direction to the jury will be, on the case as it now stands, (if *Mr. Gurney* can alter it by evidence he will), that where a commodity having a fixed price or value, which distinguishes this from the case of the sale of a horse, which has no fixed value, where, I say, such commodity is sold for a particular purpose, it must be understood, that it is to be reasonably fit and proper for that purpose, and when I say reasonably fit and proper, I mean, that a few defective sheets will not shew that it is not fit and proper.

Gurney then called the defendant's clerk, who proved, that they purchased the copper of the Mines Royal Copper Company; that they never had any complaint of their copper before; that the profit was but small, and the delivery within three days after the receipt.

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Scarlett, for the plaintiff, in reply :

If the defendants stated to the Mines Royal Company, what the copper was for, they may have their remedy over against them. In reply to the argument about the warranty of horses,

GRAY
v.
COX.

he contended, that if a horse is sold for a carriage, and it turns out to be a cavalry horse, and never to have been in a carriage at all, there is no need of a special warranty to enable the buyer to recover.

ABBOTT, Ch. J. :

The question is whether this copper, so sold by the defendants to the plaintiffs, was fit and proper, or, in the language of the declaration, serviceable copper, for unless it was so, the plaintiffs are entitled to a verdict. Though the defects could not be discovered on the first inspection, yet they must have proceeded from something wrong in the manufacture, and the merchant may have his remedy against the manufacturer.

Verdict for the plaintiffs.

1824.
April 21.

[197]

FULLER AND OTHERS v. SMITH AND ANOTHER.†

(1 Car. & P. 197—198; S. C. Ryan & Moody, 49.)

If a banker of a supposed acceptor of a forged bill discount it for the agent of one of the indorsers, on the discovery of the forgery the banker so discounting may recover back the money he paid on the bill, notwithstanding he was the banker of the supposed acceptor, and therefore might be taken to know his handwriting.

THIS was an action to recover the amount of a bill of exchange, which had been discounted by the plaintiffs for the defendants, and which afterwards turned out to be a forgery. The bill purported to be drawn by a person named Lunn, and accepted by George Norman and Son, payable at the plaintiffs', who were their bankers, and indorsed by Lunn and one Robert Simpson.

The forgery was clearly proved.

For the defendants, their clerk was examined; who swore that the defendants were the agents of Simpson, and had paid over the money to him before they had any notice of the forgery: but, on his cross-examination, he admitted that there was a running account between the defendants and Simpson, and entries in the books on both sides. These books were not produced.

† See Bills of Exchange Act, 1882, s. 58 (3).—R. C.

The *Attorney-General*, for the defendants :

FULLER

SMITH.

The defendants in this case are entitled to a verdict. It appears, from the evidence of their witness, that they were only the agents of Simpson, and had paid over the money to him before they had notice of the forgery : and if an agent pays over money to his principal, he cannot be called on *to refund. In this case, also, it appears that the plaintiffs are the bankers of the acceptors, as well as the discounters of the bill ; and bankers are bound to know the handwriting of their customers. If there was any negligence, it was on the part of the plaintiffs.

[*196]

Scarlett, for the plaintiffs :

I doubt whether Simpson was indebted to the defendants at all, because the books are not produced. But it makes no difference whether the defendants were acting as agents or not : the contract is with them, and there is a warranty on their part. It matters not, whether the subject of the action be a bill of exchange, or any thing else. Suppose a man sold another a hamper, as a hamper of wine, and it turned out to be a hamper of water ; he could not, on being called on to return the money, say, "I sold it for a principal ; you must run after him." There is no defence to the action.

ABBOTT, Ch. J. :

The only question of fact in this case is, whether the defendants paid over the money to Simpson before they had notice of the forgery ; but I am of opinion, in point of law, that they are liable, whether they did so or not. With respect to the argument, that the plaintiffs ought to have known the handwriting of the acceptors, I am of opinion, that a banker is bound to know the handwriting of those who draw on him, as far as regards paying bills so drawn, but not when discounting a bill ; for his attention is not called to it then. My opinion therefore is, that the plaintiffs in this case are entitled to a verdict. His Lordship then requested the jury to say, whether they were satisfied of the fact of the money having been paid over before notice of the forgery ; and they stated that they were not satisfied.

Verdict for the plaintiffs.

1824.
May 3.

DOE, ON THE DEMISE OF SMITH, v. CARTWRIGHT.

(1 Car. & P. 218—219; S. C. Ryan & Moody, 82.)

[218]

On an ejectment for a house, the land tax assessment of the parish in which the collector of taxes charges himself with the receipt of money from A. B. as tenant of a particular house, is evidence that A. B. was tenant at that time.

The books of an insurance company, in which they charge themselves with the receipt of a sum of money, as a premium to insure a particular house, in the occupation of A. B. from fire, are, also, evidence of his occupation. These entries are evidence, because the party making them charges himself with the receipt of money.

EJECTMENT for a house in St. Anne's Lane, in the parish of St. John the Evangelist, Westminster.

[*219]

George Fitzwater Hook died, seized of four houses in St. Anne's Lane, and by his will, dated 1777, devised one *of the houses, which he described in his will, as "late in the possession of John Young," to the plaintiff's father, and devised the other three to a person whom the defendant represented; the defendant had had possession of all four for some years, and the difficulty now was, to say which house was "late in the possession of John Young."

To shew that it was the third house from Peter Street, the land tax assessment for the year 1771, was put in; it stated Young to be the occupier.

Curwood objected, that this was not evidence of who was occupier.

ABBOTT, Ch. J.:

It appears, by the assessment, that the sum charged is paid, therefore the collector charges himself with having received the sum mentioned from John Young. It is, therefore, evidence.

The plaintiff's counsel next put in the books of the Westminster Insurance Company, to shew that this house was in the occupation of Young, and as such was insured by that office.

The entry in question stated, that George Fitzwater Hook had paid the Company 1*l.* 4*s.* as a premium to insure a house in the occupation of John Young, being the third house from Peter Street.

Curwood objected, that this was a mere entry in the private book of a third party, and therefore not evidence.

DOE
d.
SMITH
v.
CARTWRIGHT

ABBOTT, Ch. J. :

The Company charge themselves with the receipt of 1*l.* 4*s.* premium, therefore it is evidence, on the same principle as a steward's book.

Verdict for the plaintiff.

MARIA PEREZ COSIO AND PINEYRO v.
DE BERNALES.

1824.
June 15.

[266]

(1 Car. & P. 266—267; S. C. Ryan & Moody, 102.)

Husband and wife, trading as partners in Spain, cannot sue as such in our courts, without proof being given that by the law of Spain a *feme covert* is allowed to trade. Whether on such proof an action could be maintained by both—*Quære*.†

ASSUMPSIT for money had and received.

In the course of the plaintiff's case, it appeared, that the two plaintiffs were husband and wife, and that they carried on trade in Spain, as partners.

Scarlett, objected, that the wife ought not to have joined in the action, as she, as a *feme covert*, could have no property.

ABBOTT, Ch. J. :

The plaintiff must give some evidence, that, by the law of Spain, a *feme covert* in that country is authorized to have separate property, and trade on her own account.‡

† *Quære*, whether the modified capacity to contract now given to the wife by the Married Women's Property Acts has altered the presumptions here maintained.—R. C.

‡ It is extremely probable that when the action was brought, the plaintiffs' attorney was not aware that the two plaintiffs were husband and wife, one being named Cosio,

the other Pineyro; but no thing is more common on the Continent, than for the wife not to take her husband's name, but to continue to be called by the name she bore before her marriage. It is also not unfrequent for the wife to continue to use her own christian and surname, with the addition of her husband's surname. By the custom of London, a *feme*

[*267, n.]

MARIA
PEREZ COSIO
& PINEYRO
v.
DÉBERNALES

The plaintiffs' counsel not having any such proof,

ABBOTT, Ch. J. held, that the plaintiffs must be non-suited, because he could not presume that a *feme covert* in Spain could engage in trade; and as these parties sued in an English

covert carrying on trade in the city, without the interference of her husband, is considered in the City Courts as a sole trader; but she cannot sue in the Courts at Westminster; and even in the City Courts, her husband must join in actions. In the case of *Beard v. Webb*, 2 Bos. & P. 98, Lord ELDON says, "This custom is one of those customs called executory customs; the meaning of which is, customs united to the Courts of the city of London. They are pleadable in London, and not elsewhere, except so far as they may be made use of in the superior Courts by way of bar."

A wife may sue, and be sued, alone, if her husband is transported; this has long been considered as settled, as far as her power of suing during the time the sentence is actually in operation. But the case of *Carrol v. Blencow*, 4 Esp. 27, carries it further. This was an action for goods sold.

The defence was, the coverture of the plaintiff. The plaintiff's counsel, put in the record of the husband's conviction of a felony, in March, 1794, when he was sentenced to 7 years' transportation. On this, it was objected, that the term of transportation had elapsed (the trial being on the 3rd of June, 1801) and therefore, that the husband was competent to sue: but Lord ALVANLEY, Ch. J., ruled, that the record gave the wife a right to sue, as a *feme sole*, and that such right remained till the husband's return; and that though the term of transportation was expired, yet, if the defendant meant to rely on the fact of the husband having actually returned, the defendant must shew that by evidence. No such evidence being given, there

was a verdict for the plaintiff.

Another case in which a *feme covert* may sue, and be sued, as a *feme sole*, is, where her husband, being an alien, is abroad, and has deserted his wife; but in *Kay v. The Duchess de Piennes*, 3 Camp. 123, Lord ELLENBOROUGH seems to confine this to cases where the husband has never been in this country. But in the cases of husbands, who are Englishmen, going abroad, and deserting their wives, it appears, that the wife cannot be sued, as *feme sole*. In *Marsh v. Hutchinson*, 2 Bos. & P. 226, which was an action for goods sold; the defendant's husband was agent for the English packets, at Brill, in Holland, and on the invasion of that country by the French, in 1795, sent his wife to this country, he himself remaining in Holland. HEATH, J. says: there is a great difference between an Englishman going abroad, and leaving *his wife in this country, and a foreigner doing so. The former may be compelled to return, at any time, by the King's privy seal. There is not any case, where the wife has been holden liable, the husband being an Englishman. And in *Boggett v. Friar*, 11 East, 301, it was held, that in the case of an Englishman, no absence, except banishment, or something in the nature of a civil death, gave the wife the character of a *feme sole*. In general, where the cause of action would survive to the wife, she must join in the action; but in actions for goods sold, or money lent, during coverture, the husband must sue alone, as the wife could have no property in the goods or money.

[*268, n.]

Court, they were bound to shew that they had put a proper plaintiff on the record, according to the law of Spain, before the question could be raised, whether a husband and wife, being partners in trade in Spain, could sue as such in our Courts. A *feme covert* carrying on business as a sole trader in the city of London, may, by the custom of London, sue in the city Courts, but not in these Courts.

MARIA
PEREZ COSIO
& PINEYRO
v.
DEBERNALES

Plaintiffs non-suited.

CAMERON v. BAKER.

(1 Car. & P. 268—270.)

1824.

May 7.

Westminster.

BEST, Ch. J.

[268]

Where an attorney was employed for a man by his father, to defend an action brought against the son, if the son knew of the retainer, and did not disapprove of it, he is bound by the acts of the attorney, in the same way as if he had himself employed him.

If the father of an illegitimate child consents to pay an annual sum for its support, he will be bound to continue to do so, or to provide for the child himself, or to give the most distinct notice of his intention to pay such annual sum no longer.

ASSUMPSIT on the common counts.

This action was brought to recover a compensation for the maintenance and education of the illegitimate child of the defendant.

The plaintiff had married the mother of the child, and the defendant was its reputed father. It appeared that legal proceedings had been commenced against the defendant for seduction. The defendant's father employed an attorney to conduct his defence; the defendant knew of this and did not disapprove of it.

Pell, Serjt. objected that what the attorney so employed did, would not bind the defendant.

BEST, Ch. J. :

[269]

If he knew of the attorney being employed for him, and did not disapprove of it, the acts of the attorney are evidence.

The attorney stated that it was agreed that the action for seduction should be compromised, on the defendant allowing 20*l.* a-year for the maintenance of the child.

CAMERON
v.
BAKER.

Witnesses proved that the plaintiff maintained and educated the child, at a much higher expense than 20*l.* a-year.

BEST, Ch. J. :

Should you not shew some authority from the defendant?

Wilde:

We shall shew that he has paid 20*l.* a-year, and on the authority of the case of *Heskith v. Gowing*, 5 Esp. 131,† he must continue to do so, unless something has been done to put an end to that arrangement.

[270]

A witness proved receiving 5*l.* per quarter from the defendant for the child's maintenance.

BEST, Ch. J. :

The father of an illegitimate child is not in the first instance bound to maintain it, unless compelled to do so by an order of magistrates ; but if he consents to pay an annual sum for its support, he must continue to do so, or provide for the child at his own expense, or give the most distinct notice of his intention to pay such annual sum no longer.

*Verdict for the plaintiff, for 20*l.**

† The case of *Heskith v. Gowing*, 5 Esp. 131, was an action of assumpsit for the board and lodging of the defendant's illegitimate female child. The child had been nursed at the plaintiff's house, and frequently visited there by the defendant. The defence was, that no order of filiation had been made by any magistrates ; and that, though the plaintiff had formerly kept the child by the defendant's consent, the defendant had since taken the child to his own house, whence she was taken back to the plaintiff's by her mother. It however appeared that the defendant knew of the child's being so taken back, and had taken no steps to get her away again. Lord ELLENBOROUGH ruled, that the father of

an illegitimate child was liable to pay for the nursing and board of such child, if he has adopted it as his own, and acquiesced in its being disposed of in any particular way. If he took it away, he had a right to keep it in his own care ; and if the mother took it away, and put it to a person to nurse, without his consent, that person could not charge the father, as he could only be charged on his own contract : but here the child was taken back to a place where the defendant knew it had been before, and if the jury thought he acquiesced in the child's continuing there, he returned to his former liability. The jury found for the plaintiff.

WATSON AND ANOTHER v. MURREL.

(1 Car. & P. 307—308.)

1824.
Mar. 17.*Shropshire
Assizes.*

GARROW, B.

[307]

If, on an indictment against a parish for not repairing a road, the attornies on both sides enter into an agreement in which one "agrees, on the part of the parish, to pay the costs," this agreement is personally binding on the attorney; and if it is agreed that A. B. shall tax the costs, it is no answer to an action for the costs, that the defendant had no notice to attend the taxation; if he did not object to that, when he was first apprized of the taxation having taken place in his absence.

ASSUMPSIT.

The plaintiffs and the defendant were all attornies; an indictment had been preferred against the parish of Ellesmere, for not repairing a road. On the part of the parish, it was wished, that the prosecutor should consent to the recognizances entered into on the part of the parish being respited. The plaintiffs were attornies for the prosecutor, and the defendant attorney for the parish; a memorandum was signed by the plaintiffs and the defendant; it stated—"Messrs. Watson & Harper, attornies for the prosecutor, agree that the recognizances shall be respited; and Mr. Murrel, on the part of the parish of Ellesmere, agrees to pay the costs; it being agreed, that Mr. Cooper shall tax the costs." Mr. Cooper proved that he had done so.

Peake, Serjt. objected, that no action could be brought against the defendant; he merely agreed, on the part of the parish, and the parish only were liable; and that no notice to attend the taxation had been served on his client, and therefore, such a taxation could not be binding on him.

GARROW, B.:

I have no doubt that in point of law, this is a personal engagement;† but you may move to enter a nonsuit on the second point.

Verdict for the plaintiffs.

† In the case of *Appleton v. Binks*, 5 East, 148 (7 R. R. 672), the plaintiff declared on a covenant between him-

self and the defendant, who was described in the covenant, as "T. Binks, of, &c. for, and on *the part

[*308, n.]

WATSON

r.

MURREL.

May 5.

ABBOTT,

Ch. J.,

BAYLEY,

HOLROYD,

and

LITTLEDALE,

JJ.

[308]

IN BANCO.

Russel now moved to enter a nonsuit, on the ground, that no notice of taxation had been given.

BAYLEY, J. :

Did the defendant ever ask to have the taxation reviewed, or did he make any complaint when the money was demanded?

Russel : That does not appear, my lord.

ABBOTT, Ch. J. :

Taxation is a condition precedent, but the absence of one of the parties at the taxation for want of notice must be objected to at once, and not be delayed till an action is brought.

The other Judges concurred.

Rule refused.

1824.

April 2.

Gloucester

Assizes.

GARROW, B.

[319]

REX v. JOHN SCULLY.

(1 Car. & P. 319—320.)

A person set to watch a yard or garden is not justified in shooting any one who comes into it in the night, even if he should see the party go into his master's hen-roost. But if from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him.

This prisoner was indicted for manslaughter, in shooting a man whose name was unknown.

and behalf of the Right Honourable Lord Viscount Rokeby ;" it was sealed with the seal of the defendant, and it stated, if the plaintiff would convey a certain estate to Lord Rokeby, the defendant, "for himself, his heirs, executors, &c." on the part and behalf of the said Lord Viscount Rokeby, did covenant, that the said Lord Viscount Rokeby, his heirs, &c. would pay to the plaintiff 6,000*l*. The declaration went on to state notice to Lord Rokeby, and his refusal to pay the money. To

this declaration there was a general demurrer, and the Court held, that the covenant being by the defendant, in his own name, "for himself, his heirs, &c." and sealed with his own seal, he was personally bound by it. In the case of *Wilks v. Back*, 2 East, 142,† the Court said, that the proper way, where one executes a deed as attorney for another, is for him to sign, A. B. for C. D., or, for C. D. A. B.

† 6 R. R. 409.

REX
v.
JOHN
SCULLY.

It was proved that the prisoner had been set to watch his master's premises, and that he came to a constable to surrender himself. He said he had unfortunately shot a man; and that he having seen the man on his master's garden wall in the night, hailed him; and the man said to another, whom the prisoner could not see, "Tom, why don't you fire?" That he (the prisoner) hailed them again, and the same person said, "Shoot and be d—d," whereupon he fired at the legs of the man on the wall, whom he missed, and shot the deceased, whom he had not seen from his being behind the wall.

This confession was the only evidence against the prisoner; but it was proved, that when the deceased was found, he had three dead fowls and a housebreaker's crowbar lying near him, and a flint, steel, and matches in his pocket.

GARROW, B.:

Any person set by his master to watch a garden or yard is not at all justified in shooting at or injuring in any way, persons who may come into those premises, even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened, and if he considered his life in *actual danger, he was justified in shooting the deceased as he had done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he would be guilty of manslaughter.

[*320]

Verdict—Not guilty.

REX v. WILLIAM WALKER.

(1 Car. & P. 320—321.)

1824.
April 2.

[320]

If a person is driving a cart at an unusually rapid pace, and drives over another, and kills him, he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so if he had not been drunk.

This prisoner was indicted for manslaughter, in killing Thomas Crates.

REX
v.
WALKER.

The deceased was walking along the road leading from Bristol to Bitton, in a state of intoxication. The prisoner was driving a cart drawn by two horses without reins; the horses were cantering, and the prisoner sitting in front of the cart. On seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so; and one of the cart wheels passed over him, and he was killed.

[*321]

GARROW, B. laid down, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way; if from the rapidity of the driving, *or any other cause*, the person cannot get out of the way time enough, but is killed, the driver is in law guilty of manslaughter; and that it is the duty of every man who drives any carriage, to *drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur.

Verdict—Guilty.

1824.
July 17.
[414]

BREMNER v. WILLIAMS.

(1 Car. & P. 414—416.)

Every stage-coach proprietor ought to examine the sufficiency of the coach previous to each journey; and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the coach proprietor for negligence, though the coach had been examined previous to the second journey before the accident; and though it had been repaired at the coach-maker's only three or four days before.

ASSUMPSIT against the defendant, who was proprietor of a Kentish-Town stage, to recover a compensation for an injury sustained by the plaintiff, in consequence of the insufficient state of the defendant's coach.

It was proved, on the part of the plaintiff, that he, and his two sons, got into the dickey of the coach in question, for the purpose of being taken to Kentish-Town. When the coach was in Gray's Inn Lane, the plaintiff felt a moving of the dickey, and called to the driver, and told him of it, and asked him if it

was loose? The driver replied, that the motion was produced by the bending of the springs merely, and then drove on; and, soon after, the dickey came off, and the plaintiff fell.

BREMNER
*
WILLIAMS.

On the part of the defendant, the driver was called; who stated, that the coach had come from the coach-maker's, *where it had been under repair, only three or four days before the accident; that it was not a very old coach; and that he washed it, and his master examined it, on the very morning on which the accident happened. On his cross-examination, he admitted, that, at the time the plaintiff went, the coach was on its second journey, and that no examination had taken place immediately previous to that journey.

[*415]

The coach-maker also proved that the coach was sent to him, with directions to do the needful; which he did: and when he sent it out, he had every reason to believe it safe. He stated, also, that the condition of that part which broke, and to which the dickey was attached, could not be discovered by external examination only. But, on his cross-examination, he admitted, that its breaking might have been produced by previous over-loadings.

Vaughan, Serjt. for the defendant:

This action is founded in negligence; and it should be shewn that the defendant, or his servants, were undoubtedly to blame. The proprietor is only responsible if there is not ordinary and reasonable care. If the coach came out of the coach-maker's defective, and the defect could not be discovered by external inspection, the defendant certainly cannot be liable.

Pell, Serjt. for the plaintiff, in reply:

The driver should have stopped and investigated the plaintiff's complaint when it was made to him in Gray's Inn Lane. The action is not, as has been said, founded in negligence. The record is, that the defendant undertook securely to carry the plaintiff to the end of his journey. It was a part of the substance of the coach which gave way. The proprietor is bound to provide for every journey a coach fit and competent for the performance of that journey.

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v.
WILLIAMS.
[*416]

BEST, Ch. J. :

The declaration states, that the defendant *undertook to carry the plaintiff safely. There is no express undertaking that the coach shall be sound, nor is it necessary; for I consider that every coach-proprietor warrants to the public that his stage-coach is equal to the journey it undertakes.† The counts go on to charge negligence, and the case may be decided upon that ground also. The plaintiff, it seems, complained in Gray's Inn Lane; and if the driver had then got down, most likely the accident would not have happened. It is for the jury to say, whether, when a man's attention is called to a particular motion of the dickey of his coach, and he does not get down to examine the cause, is not this a negligence? The driver said it was the playing of the springs; but it could not be so, for the plaintiff would have found that before. I am of opinion that it is the duty of a proprietor of a stage-coach to examine it previous to the commencement of every journey. For, when ten or fourteen people are placed on the outside, as is the case with many of these stages, a master is guilty of gross negligence if no inspection of the coach takes place immediately previous to each journey.

Verdict for the plaintiff—Damages 51l.

† This part of the ruling of the learned Judge is overruled by *Readhead v. Midland Ry. Co.* (1867—69) L. R. 2 Q. B. 412; 4 Q. B. 379.

But the ruling, as a whole, is not without importance. See the judgment of LINDLEY, J. in *Hyman v. Nye* (1881) 6 Q. B. D. 685, 687.—R. C.

WHARTON *v.* LEWIS.

(1 Car. & P. 529—531.)

1824.
Dec. 6.

[529]

In an action for breach of promise of marriage, if it appear that the defendant was induced to make the promise, or to continue the connexion, either by misrepresentation or wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff, this goes in bar of the action, and not to the damages only: and if the defendant's counsel cross-examines as to certain misrepresentations made towards the defendant, and deceptions practised on him; this is to be considered as notice to the plaintiff's counsel of the line of defence; and therefore if he has letters of the defendant, tending to show that he knew the real state of the facts, the plaintiff's counsel ought to give them in evidence before the plaintiff's case is closed, and he will not be allowed to put them in as evidence in reply.

BREACH of promise of marriage.

The promise was proved by parol evidence, and the plaintiff's witnesses were cross-examined as to certain misrepresentations made to the defendant's father relative to the circumstances of the plaintiff's family, and the situations she had previously filled.

The defence was, that the defendant had made the promise *under fraudulent and false representations of the plaintiff's former situation, and the circumstances of her family; and it was proved that her brother (in whose house she was residing, and who was a witness for the plaintiff) had stated to the defendant, previously to the promise, that her father would leave property to her at his death; whereas, in fact, he had, a short time before, compounded with his creditors: and it also appeared from the evidence of the defendant's father, that, a few days after the promise, he received an anonymous letter, stating, among other things, that she had been a bar-maid, and had carried on the business of a milliner, at Oxford, with another lady who was then in keeping; and that the defendant in consequence broke off the match: but on this letter being shewn by the defendant's father to the father and brother of the plaintiff, they represented that these statements were false, and the courtship was renewed, but afterwards finally broken off. It was now proved that the plaintiff had acted as barmaid at Mivart's hotel, and had previously carried on the business of a milliner at Oxford under circumstances of suspicion, the marshal of the

[*530]

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LEWIS.

University having had directions from the proctors to keep a watch on the house.

As soon as the defendant's case was concluded, *Brougham* wished to give as evidence in reply, to cut down the evidence of the defendant's father, two letters written by the defendant, which went to disprove any deceptions, by shewing that he was aware of some of these facts before the match was broken off.

[*531] *Scarlett* objected that his cross-examination of the plaintiff's witnesses, as to the deceptions practised on the defendant, gave notice to the plaintiff's counsel of what line of defence he was taking, and therefore the plaintiff's counsel ought to have given these letters in evidence, to *shew that there was no deception, before he had closed his case, but that they were not admissible in reply.

ABBOTT, Ch. J. :

By very strict rule, the cross-examination must be held to be notice to the plaintiff's counsel that it was intended to be alleged by the defendant that deceptions had been practised ; and therefore the plaintiff's counsel ought to have gone into evidence to rebut that, before he closed his case. I think I must, therefore, reject the evidence.

Brougham having replied,

ABBOTT, Ch. J. left it to the jury to say whether the defendant was induced to make this promise, or to continue this connexion, by false representations or wilful suppression of the truth ; for if he was induced to continue the connexion by misrepresentation or wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff, it was a good defence to this action, and the defendant was entitled to their verdict.

Verdict for the plaintiff—Damages 150l.

WELBY *v.* DRAKE.

(1 Car. & P. 557.)

1825.
Jan. 12.

[557]

If one is sued on a bill of exchange, and it appear that the plaintiff has agreed with a third person that if he will advance part of the sum for the defendant, the plaintiff will take that in discharge of the whole debt, and the third person so advances it, that is a good defence to the action.

ASSUMPSIT against the defendant as drawer of a bill for 18*l.* 3*s.* 11*d.*, which had been returned unaccepted.

It appeared that the plaintiff had agreed that if the defendant's father would pay him 9*l.* he would accept it in satisfaction of the whole debt; and this sum of 9*l.* was accordingly paid by the father.

Chitty, for the defendant, contended, that though a party himself, by paying a less sum than is due, does not discharge the debt, yet if, in consideration of a third person coming forward to pay a less sum, the creditor agrees to take it in satisfaction, and that a less sum is so paid, it cancels the debt.

ABBOTT, Ch. J. :

If the father did pay the smaller sum in satisfaction of this debt, it is a bar to the plaintiff's now recovering against the son; because by suing the son he commits a fraud on the father, whom he induced to advance his money on the faith of such advance being a discharge of his son from further liability.

Verdict for the defendant.

FOOTE v. HAYNE.

1824.
Dec. 21.

(1 Car. & P. 545—547; S. C. Ryan & Moody, 165.)

[545]

A party will not be allowed to go into evidence of the time when the counsel for the opposite party was retained, either by calling the counsel's clerk or otherwise; as the retaining of counsel falls within the rule respecting confidential communications.

If, in an action for breach of promise of marriage, the defence set up is, that the defendant was induced to make the promise through misrepresentations made to him; and it is proved that the plaintiff knew that her father wrote letters to the defendant, in which he made statements respecting her; such letters are evidence for the defendant, although there is no proof that the plaintiff had read them, or was acquainted with their exact contents: but the plaintiff would not be considered answerable for the particular expressions contained in them.

But a verbal representation made by the plaintiff's father (she not being present) to a third person, who communicated it to the defendant, is not evidence.

BREACH of promise of marriage.

[*546]

By the evidence on the part of the plaintiff (Miss Foote, the celebrated actress), it appeared that the defendant had made several distinct promises to marry the plaintiff, and had broken off the match after each of the promises. It also was admitted that the plaintiff had had *two children by Colonel Berkeley; but of this the defendant was aware after the breaking off the first promise, and before the making of the second. The plaintiff's attorney was called, on the part of the plaintiff, and asked whether he had not, on or about the 29th of September, 1824, applied to Mr. Scarlett's clerk at his chambers, for the purpose of retaining him as counsel, and whether he was not shewn a book? The object of this was, to shew that the defendant had retained Mr. Scarlett as his counsel in any action the plaintiff might bring against him, on the very day on which one of the later promises was made.

Scarlett :

This is really not evidence. My clerk is in attendance, having been served with a *subpœna duces tecum*, to produce my retainer-book.

ABBOTT, Ch. J. :

I cannot receive any evidence of the retainer of the opposite

counsel. I am decidedly of opinion that it ought not to be put in evidence, as it comes clearly within the rule with respect to confidential communications.

FOOTE
v.
HAYNE.

The defence was, that the defendant had been deceived into making these promises, by the false representations made to him by the plaintiff, and her father and mother with her knowledge. On the cross-examination of the plaintiff's witnesses, it was proved that the plaintiff had told the defendant, when he first made his proposals, that she could not give any answer, till a promise of marriage she had made to Colonel Berkeley was put an end to: but that, in fact, at that time she was in a state of pregnancy; and that when she left London for her second accouchement, *she knew that her father, who remained in London, wrote letters to the defendant respecting her, though it did not appear that she knew the exact contents of any of these letters.

[*547]

The defendant's counsel wished to give these letters in evidence, to shew the misrepresentations that were made to the defendant; the letters stating that the plaintiff had gone into the country for a pulmonary complaint.

The plaintiff's counsel objected that they were not evidence, because they were written by a third person, and the plaintiff was not proved to have been acquainted with their contents.

ABBOTT, Ch. J. :

As it is in evidence that the plaintiff assigned as the reason of her not giving an answer to the defendant's proposals, that she was under a promise to marry Colonel Berkeley, it is open to the defendant to give in evidence any thing to shew that that was not true; and as it is also in proof that the plaintiff knew that her father was making representations to the defendant respecting her, his letters are evidence, though the plaintiff will not be answerable for the particular expressions contained in them.

The letters of Mr. Foote were read.

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v.
HAYNE.

The defendant's counsel then wished to call a witness to prove that the plaintiff's father had (at a time when the plaintiff was not present,) made a representation to him of the good conduct and character of the plaintiff, which he had afterwards communicated to the defendant.

ABBOTT, Ch. J.:

That is certainly not evidence. I have already received what, in the strictness of former times, would not have been thought admissible.

Verdict for the plaintiff—Damages 3,000l.

1825.
April 18.
[625]

GREENING v. WILKINSON.†

(1 Car. & P. 625—626.)

In trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretion.

TROVER for East India Company's warrants for cotton.

Evidence was given that the cotton was worth sixpence per pound at the time of the refusal to deliver it up, but would now be worth tenpence-halfpenny.

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The *Attorney-General* contended, on the authority of the case of *Mercer v. Jones*, 3 Camp. 477, that the damages should be the value at the time of the conversion.

Scarlett, contra, contended that it must be the price at the time of the verdict, in the same way as damages for the non-performance of an agreement to re-purchase stock.

ABBOTT, Ch. J.:

I think that case is hardly law, and that the amount of the damages is for the jury, who may give the value at the time of the conversion, or at any subsequent time in their discretion,

† Referred to and substantially followed by STEPHEN, J. in *Johnson v. Hook* (1883) 31 W. R. 812.—R. C.

because the plaintiff might have had a good opportunity of selling the goods if they had not been detained. I am therefore of opinion that the price of the article on the day of the conversion is by no means the criterion of the damages. It may be said, that if he had wanted cotton he might have immediately bought more, at that day's price, as soon as he found that this cotton was detained from him; but, then, to do that, he must have had the money, which he might not have ready on the very day of the detention, nor on any day after till the price had risen; and my opinion is, that the jury are not at all limited in giving their verdict by what was the price of the article on the day of the conversion.

GREENING
v.
WILKINSON.

Verdict for the plaintiff.

LEIGH v. SMITH.

(1 Car. & P. 638—642; S. C. Ryan & Moody, 224.)

If goods be sent to a wharf, to go by a vessel to any place on the coast of England, the wharfinger does not discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board it. *Semble*, that it is the wharfinger's duty, either by himself or his servants, to see the goods put on board, and then make an entry of the shipment.

THIS was an action by a soap-boiler at Liverpool, against a wharfinger in London, to recover the value of a hogshead of tallow, sent to the defendant's wharf for the purpose of being conveyed to Liverpool by a ship called the *Mars*, and which the plaintiff had never received.

A carman proved that he deposited the hogsheads, with the plaintiff's direction on them, at the wharf, three or four yards from the vessel, and did not see either the captain or mate.

The mate of the *Mars* proved, that he received two hogsheads, directed to the plaintiff, and no more. He also said, "We take no charge of the goods till we actually take them on board."

The master of the vessel confirmed the mate's testimony as to the receipt of two hogsheads only; but added, that there were three entered in the wharfinger's book, and, in consequence, he looked about for the third, but was not able to find it.

1825.

Feb. 21.

Guildhall.
BEST, Ch. J.
[638]

[639]

LEIGH
v.
SMITH.

Vaughan, Serjt. for the defendant :

I admit that, for the wharfage, the wharfinger is bound to put the goods into the charge of the party belonging to the ship. He does not undertake to ship or forward. When he once calls the attention of the people of the ship to the goods, he has done his duty.

BEST, Ch. J. :

A wharfinger receives goods, and he is to keep them till they are shipped ; and, further, he is to see that the persons belonging to the ship do in fact ship them.

Vaughan, Serjt., then cited the case of *Cobban v. Downe*, 5 Esp. 41,† and contended, that it was enough for the wharfinger to make an entry in his book of the goods, as he had done in this case, such entry being notice to the captain, and throwing upon him the duty of searching for them and putting them on board.

BEST, Ch. J. :

If the entry were to be considered enough, what a situation would persons be in if the goods were to be lost, the day after they were sent, through the negligence of the wharfinger.

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Vaughan, Serjt. :

The officer of the ship may load at his own convenience, but his responsibility commences with the notice. If the goods are stolen in the intermediate time between the notice and the loading, the ship-officer is liable.

BEST, Ch. J. :

The ship-officer is not liable till he gets the custody of the goods.

Vaughan, Serjt. then called the defendant's clerk, who proved that the hogshead in question was rolled in his presence to within three or four yards of the vessel ; that his attention was called away for some time, and when he returned he did not

† 8 R. R. 825.

see it there; that he entered it as shipped, supposing it to be so; that he could not say whether or no the mate was immediately on the spot at the time, but that the men were.

LEIGH
v.
SMITH.

Vaughan, Serjt. then proposed to ask a wharfinger this question: "What is the usage with respect to goods that are going coastwise as to the mode of delivery into the hands of the captain or mate?"

Wilde, Serjt. objected.

Vaughan, Serjt. mentioned again *Cobban v. Downe*, before cited.

BEST, Ch. J.:

On the authority of this case I shall receive the evidence of the usage.

The witness then stated the usage to be, for the wharfinger to receive the goods and keep them dry, and then for the ship's company to come and roll them to the ship, and for one of the clerks to take an account of their being placed at the quay-side, to be taken to the ship, and that, from such time, the ship's company were considered to *take the charge. On his cross-examination, he said, "We deliver to the mate of the ship."

[*641]

BEST, Ch. J.:

I am of opinion that this is an usage abundantly in favour of the wharfinger, and that it ought not to be extended. If it could, a delivery might be to a cabin-boy. A wharfinger must prove, by distinct evidence, that he delivered to the mate or an officer of the ship.

Vaughan, Serjt.:

Not into his hands, I presume. The mate, in this case, was, it appears, superintending the loading.

Wilde, Serjt., then replied.

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v.
SMITH.

BEST, Ch. J., called up the mate, who said, in answer to a question put by his Lordship, that he took all the casks of tallow on board which were pointed out to him.

His Lordship, then, in his charge to the jury, observed :

The only question in this case is, has the cask in question been lost through the negligence of the wharfinger or of the master or mate of the ship? It is the duty of the wharfinger to see that goods sent to him go by some ship or other. It is not by his servants that they are put on board, but he is to see that they are removed by the crew of the ship. I question if the case which has been cited is not a little too narrow. But that case decides that there must be a delivery to the master or mate; and I should hope that a wharfinger never will be held to have done his duty, if he delivers to one of the crew only. He must deliver to some one in authority. The clerk to the defendant should have stood by and seen the cask taken on board, and then entered it. His evidence does not prove a delivery to some one in authority. There are cases in which a delivery even to the mate will not do. Suppose *the mate cannot take the goods in in one day, and they are obliged to remain till the next, no man in his senses will say that the wharfinger is not responsible during the intervening time. In my opinion, it is the duty of the wharfinger to say, "There, mate, are your casks, take them on board." If the case strikes you so, then the plaintiff is entitled to a verdict, for the wharfinger has not done his duty.

[*642]

Verdict for the plaintiff.

GILLMAN AND ANOTHER *v.* ROBINSON.

(1 Car. & P. 642—644 ; S. C. Ryan & Moody, 226.)

1825.
Feb. 22.

[642]

If a tradesman living in the country receive goods, ordered on his behalf by a person in London, and pay for them in several instances, he is liable for goods furnished on an order given by that person afterwards, though he did not receive them, such person having appropriated them to his own use.

ASSUMPSIT for goods sold.

The plaintiffs resided in London, and the defendant at Driffield, in Yorkshire. A man, named Womack, ordered the goods on behalf of the defendant, but intercepted them on their way, and applied them to his own use. Womack had bought goods of the plaintiffs, as well as of other houses, several times before, as the agent of the defendant, for which the defendant had paid.

Vaughan, Serjt. for the defendant, submitted, that he was not liable. It would be most mischievous to hold, that because I give an agent authority to purchase for me, it is to give him an unlimited power to use my name, and pledge my credit to any extent. Suppose I admit the proof that there was employment in certain specific instances, yet a jury are not, thereby, warranted in finding *the existence of an unlimited authority, nor is it, indeed, any evidence to go to them of such a fact. General agency may be presumed in cases of underwriting policies of insurance, or drawing bills of exchange. There, if the act be done in several instances, it is enough ; for the nature of the transaction is such, as to raise the inference of authority. But the case of ordering goods is different. It may apply to an agent abroad : and is a man's credit to be pledged all over Europe ? It is better to suffer a private mischief than a public inconvenience ; and nothing is so mischievous and inconvenient as to imply a general authority from a few specific instances. *Non constat*, but in those instances in which the defendant recognized the dealing, Womack had a particular authority.

[*643]

BEST, Ch. J. :

There is abundant evidence to go to the jury. I agree that

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ROBINSON.

one transaction is not enough to raise the presumption of general authority, but several instances are, I think, sufficient. This case cannot be distinguished from the cases of master and servant, unless the jury should be satisfied that Womack's authority was terminated at the end of each transaction. One of two innocent persons must suffer for the fraud of a third. The defendant should have notified that his authority only applied to the particular transaction; and if he held out the party as his agent, and the seller trusted him upon that, the defendant is the one of the two innocent persons who ought to suffer.

From the evidence on the part of the defendant, it appeared that he gave Womack written instructions, by letters, as to what he was to buy for him.

Wilde, Serjt. replied :

[*644]

The question is not, what were the private instructions of the defendant to Womack, but how he sanctioned Womack in connection with the London houses. *The London houses would not, by the course of business, see the letters. They have no means of knowing whether a man is a general or particular agent except by the way in which the principal acts. The defendant ought to have said, Do not trust Womack generally for me, but always ask him for his letters. Evidence can never go higher than this. Here is payment to several houses as well as the plaintiffs, for goods received through Womack's orders. *Whitehead v. Tuckett*,† decides, that private instructions cannot limit a general authority.

Best, Ch. J. :

Upon principle, if a man holds another out to the world as his general agent, he is responsible for his acts; and it is important that it should be so, because, otherwise, a man might accredit another, and, after he had cheated many to their ruin, turn round and say, Though this man appeared as my agent, yet he had no authority from me. You must be satisfied, not

† 13 R. R. 509 (15 East, 400).

only that the goods were ordered for the defendant, but that the authority of the party ordering them was so far recognized as to render the defendant responsible. It is admitted, that, in the cases of policies and bills of exchange, agency is proved by several instances. This feature in the law of agency is not confined to those cases, but applies equally and similarly to the ordering of goods.

GILLMAN
v.
ROBINSON.

Verdict for the plaintiffs.

NORTON v. HERRON.

1825.

(1 Car. & P. 648—649; S. C. Ryan & Moody, 229.)

[648]

If a man describe himself, in the beginning of an agreement to grant a lease, as making it on behalf of another, but in the subsequent part of it say that he will execute the lease, he is personally liable.

THIS was an action to recover damages for the breach of an agreement in the following terms:—

“Memorandum of an agreement made this 14th day of April, 1824, between George Herron, on the behalf of Edward Barron, of the one part, and James Norton of the other part, to wit, first, the said George Herron doth hereby agree to execute unto the said James Norton a lease of all that messuage, &c., situate, &c., late in the possession of ——— Nicholls, to hold, from the 12th of May, being the half-quarter between Lady Day and Midsummer now next ensuing, for seven, fourteen, or twenty-one years, at and under the annual rent of 180*l*.” &c.

A tenant, who was in possession, refused to quit, and the plaintiff could not obtain his lease.

Pell, Serjt. on behalf of the plaintiff, contended that the defendant had rendered himself personally liable, though he had described himself at the beginning of the agreement as making it on the behalf of another. He cited the cases of *Appleton v. Binks*, 5 East, 148,† and *Burrell v. Jones*, 3 B. & Ald. 47.‡

Vaughan, Serjt. for the defendant, contended, that *Appleton*

† 7 R. R. 672.

‡ 22 R. R. 296.

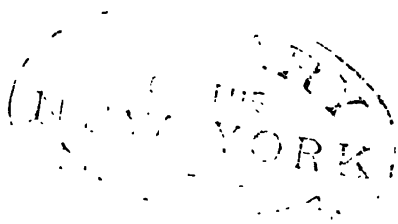
NORTON
v.
HERRON.

v. *Binks* did not apply, inasmuch as that was an action of covenant, and not, like the present, merely assumpsit. The terms, heirs, executors, and administrators, used in that case, shew an intention to bind the heirs, &c., though the party is described as only agent. But, in the present case, all that the party says is, —I, as agent for Barron, agree that Barron shall grant a lease. The defendant has no interest in the subject-matter of the agreement. [*649] *It appears from the second case cited, that the parties intended to be bound personally, and that the word solicitors was mere description. It was evidently their intention to pay the money there sought to be recovered; but it could not be the intention of the defendant in this case to make himself personally liable. The rule of *respondeat superior* applies wherever there is a known principal.

BEST, Ch. J.:

It is said that as the defendant entered into the contract on behalf of Barron, therefore the action should be brought against Barron. The case of the deed is stronger than this: but the last case cited was that of a simple contract. In that it was held that the word “solicitors” was mere description, and I cannot distinguish between that case and the present; and I am of opinion that the agreement is binding on the defendant. The cases of brokers are different, because, there, the fact of agency is known to every one; but in this case, the man, after describing himself as agent, goes on to contract in his own name.

Verdict for the plaintiff.



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And see **Will**, 1, 7, 12.

APPROPRIATION OF PAYMENT. See **Payment.**

ARBITRATION — 1. **Validity of award—Powers of arbitrator.**—Although an award which finds the special facts is in the nature of a special verdict, it is not to be construed with so much strictness; but the award is to be maintained, if it is good in substance.

A plaintiff declared in an action on the case for an injury done to his reversionary interest. The action was referred to an arbitrator, who found for the plaintiff, with nominal damages; but the language he used in finding the special facts appeared to indicate rather a possessory interest: Held, that the award was good, as the Court would not presume that damages had been given in respect of any injury but that which was the subject of the declaration.

An arbitrator gave a shilling damages, which he declared to be in full for the injury which the plaintiff had sustained up to the time of making the award: Held, that although the arbitrator had exceeded his authority in giving damages beyond the commencement of the action; yet, as the damages themselves were (and *à fortiori* the excess was) merely nominal and could not affect the costs, the award was good. *Harding v. Hanson* . 547

— 2. — — An award will not be set aside upon any ground, which in truth is a question upon the merits between the parties.

An arbitrator, in regulating the future use of a stream of water, the right to which was divided between the parties, interfered with the customary enjoyment by one of them of another stream, which exclusively belonged to him, and was not a matter in difference, and which joined the first: Held, that he had a power to do so, incidental to, and resulting from his former direct and larger power. *Winter v. Lethbridge* 709

— 3. — **Death of party before award—Award against estate—Provision in reference—Authority to refer.**—A cause being depending in Chancery between M. D. and divers infants plaintiffs, and T. B. since deceased and J. R. defendants, it was ordered, with the consent of the attorneys of the parties in the suit, that the matters in question in the suit and all disputes between M. D. and T. B. should be referred to the arbitration of W. C., who was to make one or more awards, and in case either of the parties should die, the death was not to abate the reference. T. B. died before the making of the award. The arbitrator awarded that the executor of T. B. should pay plaintiff 225*l.* out of T. B.'s assets: This the defendant, the executor, promised to pay:

Held, by the C. P., on demurrer, that the action lay against the executor; that the promise sufficiently appeared to have been made in his representative

capacity; that a sufficient authority to refer was shewn, and a sufficient award to enable plaintiff to sue; and that the authority was not revoked by the death of T. B.

But held by the K. B., on error, that the submission was void for want of mutuality,—it not appearing that the attorneys in the suit had any sufficient authority to refer on behalf of the infants. *Dowse v. Coxe* 565

ARBITRATION—4. Validity of award—Improper conduct of arbitrator—Non-performance of award—Motion for attachment.—Corruption in the arbitrator is no answer to a motion for an attachment for non-performance of an award. *Brazier v. Bryant* 618

ARMY—1. Officer—Right to command troops in colony.—A. being a commissioned officer on full pay in a regiment, was appointed civil superintendent of a colony, and at the same time was appointed to the command of such of his Majesty's subjects as then were armed or might thereafter arm for the defence of the settlers in the colony: Held, that the appointment to command all persons armed in defence of the settlers in the colony, vested in him the right to command the military forces there. *Bradley v. Arthur* 273

— 2. — After loss of regimental rank.—After an officer had acted as military commander in a colony for some years, the regiment in which he held a commission was disbanded, and he was put upon half-pay. Both before and after the disbanding of the regiment, he acted as military commander and civil superintendent of the colony, and he was recognised as filling both characters by the authorities at home: Held, that although by the disbanding of the regiment he lost his commission and rank in the regiment, the right to command the king's troops at the colony continued, and therefore that he was justified in putting under arrest, for disobedience of orders, a commissioned officer on full pay, holding equal regimental rank with himself. *Bradley v. Arthur* 273

— 3. Officer's pay—Set-off—Estoppel.—The paymaster of a military corps had given credit in account to an officer in that corps from the 1st January, 1817, to the 5th November, 1820, for certain increased pay, erroneously supposed to be granted by a general order of the 27th August, 1806, to an officer of his rank, and a statement of that account was delivered to the officer in 1821. In December, 1816, the paymasters were informed by the Board of Ordnance that the increased pay granted by the order of 1806 would not be allowed to persons in the situation of the officer in question. The paymasters did not communicate this information to the officer until 1821, and subsequently to that time they continued to receive his pay: Held, in an action brought by his personal representative to recover pay, that it was not competent to the paymaster to retain any of those sums of money on account of the sums which they had credited him for by way of increased pay, and which they had allowed him to consider his own for so long a period of time. *Skyring v. Greenwood* 264

ARREST, ILLEGAL. See False Imprisonment.

ASSETS—Marshalling. See Executor and Administrator, 4.

ATTACHMENT, Motion for. See Arbitration, 4.

BAILEMENT—Duty of wharfinger.—If goods be sent to a wharf, to go by a vessel to any place on the coast of England, the wharfinger does not discharge his duty by delivering them to one of the crew, but should deliver them to the captain of the vessel, or some other person in authority on board it. *Semble*, that it is the wharfinger's duty, either by himself or his servants, to see the goods put on board, and then make an entry of the shipment. *Leigh v. Smith* 791

BANKER—1. Bond to secure overdraft. *See* **Principal and Surety**, 1.

— 2. Discount of forged bill. *See* **Bill of Exchange**, 2.

BANKRUPTCY—1. Injunction—Transfer of stock comprised in post-nuptial settlement.—French stock, the property of the bankrupt, was transferred by him to his wife, who afterwards transferred it to her three sisters; the wife, who had a general power of appointment over monies standing in the name of trustees in the English funds, made a will by which she exercised that power, and died in her husband's lifetime; one of the three sisters, who was also an appointee and residuary legatee, and usually resided in France, took out administration to her, with the will annexed. An injunction was granted, at the suit of the assignee of the bankrupt, to restrain the trustees from transferring any of the stocks in the English funds over which the deceased wife's power of appointment extended. *Stead v. Clay* 169

— 2. Proof—Bill of Exchange.—Omission to give notice of dishonour to bankrupt or his assignees held to exclude right to prove for amount of bill. *Rohde v. Proctor* 369

— 3. — Firms with common partner.—Five persons are co-partners in one bank, and four of them are co-partners in another bank; in consequence of their banking transactions, the smaller firm becomes indebted to the larger, and a commission issues against the five co-partners: Held, that the larger firm is entitled to prove against the less the debt due to it from the latter. *Ex parte Castell* 176

And see **Bill of Exchange**, 6; **Principal and Agent**, 3.

BARRISTER—1. Power to bind client by consenting to order.—A party is bound by the consent of his counsel given in Court, though they had no instructions to consent, if they were at the time apprised of all those facts, of which the knowledge was essential to the proper exercise of their discretion; but he will be relieved from an order made by such consent, if they give that consent in ignorance of material circumstances.

How far a party will be affected by the remissness of his solicitor in not immediately objecting to an order made by the consent of counsel in Court, when neither the partner nor his solicitor was present, and instructions to consent had not been given by either. *Furnival v. Bogle* 34

— 2. Statement by counsel.—A statement made by a counsel upon his address to the jury, but in the hearing of his client, is binding on the client if he makes no objection. *Colledge v. Horn* 606

— 3. Retainer—Confidential communication. *See* **Evidence**, 3.

BASTARDY.—If the father of an illegitimate child consents to pay an annual sum for its support, he will be bound to continue to do so, or to provide for the child himself, or to give the most distinct notice of his intention to discontinue the allowance. *Cameron v. Baker* 777

BILL OF EXCHANGE—1. Arrangement with third person to accept composition.—If one is sued on a bill of exchange, and it appears that the plaintiff has agreed with a third person that if he will advance part of the sum for the defendant, the plaintiff will take that in discharge of the whole debt, and the third person so advances it, that is a good defence to the action. *Welby v. Drake* 787

— 2. Forged bill—Discount by supposed acceptor's banker—Recovery back of money paid.—If a banker of a supposed acceptor of a forged bill discount it for the agent of one of the indorsers, on the discovery of the forgery the banker so discounting may recover back the money he paid on the bill, although he was the banker of the supposed acceptor, and therefore might be taken to know his handwriting. *Fuller v. Smith* . . . 772

BILL OF EXCHANGE.—3. **Notice of dishonour—Bankruptcy of drawer.**—The drawer of a bill of exchange became bankrupt and absconded before it was due, but his house remained open, in the possession of the messenger under a commission of bankruptcy issued against him for some time after the bill became due, and before that time the holder of the bill had notice that A. and B. were chosen assignees of the bankrupt's estate. The acceptor also became bankrupt before the bill was due, and when due it was dishonoured. The holder did not give notice of the dishonour to the drawer or leave it at his house, nor did he make any attempt to give notice to the assignees of the drawer: Held, that the bill was not provable under the commission issued against the drawer. *Rohde v. Proctor*. 369

— 4. **Presentment for payment.**—Presentment of a bill of exchange at the house of a trader or merchant, between eight and nine in the evening: Held, sufficient. *Triggs v. Newnham*. 678

— 5. **Promissory note.**—An instrument in the following form: "Received of A. B. 100*l.*, which I promise to pay on demand, with lawful interest," is a promissory note. *Green v. Davies*. 230

— 6. — **Accommodation note—Discharge of indorser—Acceptance of composition.**—In an action upon a promissory note against a party who had indorsed it for the accommodation of the maker, it appeared that the plaintiff, the indorsee, had signed an agreement to accept from the maker of the note 5*s.* in the pound in full of his demand, on having a collateral security for that sum from a third person. It further appeared that the agent of the maker had represented to the plaintiff before he signed the agreement that the defendant would continue liable for the residue of the debt secured by the note, and that the agreement would be void unless all the creditors signed. Held, first, that the execution of this agreement had the effect of discharging the surety; secondly, that the representations being as to the legal effect of the agreement, were immaterial, and had not the effect of avoiding it, and that as the latter of them gave to the agreement a meaning different from that which appeared upon the face of it, parol evidence of that representation was not admissible, per BAYLEY, J. *Lewis v. Jones*. 360

— 7. — **Insufficiently stamped note—Authority of Inland Revenue Commissioners to accept penalty.**—In assumpsit by an executrix on a promissory note for 100*l.*, made in 1814, and payable to her testator, it appeared that it had a threepenny receipt stamp and a one pound agreement stamp, and there was indorsed upon it a receipt for a penalty of 5*l.* and 1*l.* duty. The proper stamp for such a note in 1814 was a three shilling stamp: Held, that as it appeared upon the face of the note that it had been issued without having affixed to it a stamp equal in amount to that required by law, the commissioners had no power after it had been issued to affix to it another stamp, and, therefore, that it was not receivable in evidence, either in support of the count for the promissory note or of the money counts. *Lewis v. Jones*. 360

BRIDGE.—The inhabitants of a county are not bound to widen a public bridge. *R. v. The Inhabitants of Devon*. 440

CANAL.—Liability to poor rate. See Poor Law, 5.

CARRIER.—1. **Negligence—Condition of stage-coach.**—Every stage-coach proprietor ought to examine the sufficiency of the coach previous to each journey; and if he does not, and by the insecurity of the coach a passenger is injured, an action is maintainable against the coach proprietor for negligence, though the coach had been examined previous to the second journey before the accident; and though it had been repaired at the coach-maker's only three or four days before. *Bremner v. Williams*. 782

CARRIER—2. Negligence—Injury through negligence of driver.

—The driver of a stage-coach ran into a bank, and upset the coach. He had passed the spot where the accident happened 12 hours before, but in the interval, a landmark had been removed. In an action for an injury sustained by this accident, the Judge told the jury that as there was no obstruction in the road, the driver ought to have kept within the limits of it; and the accident having been occasioned by his deviation, the plaintiff was entitled to a verdict.

A verdict having been returned accordingly, the Court granted a new trial, on the ground that the jury should have been directed to consider whether or not the deviation was the effect of negligence. *Crofts v. Waterhouse* 631

— 3 — **Notice limiting liability.**—To fix a plaintiff with knowledge of a general notice by which a coach proprietor had limited his responsibility, it was proved that the plaintiff had taken in for three years a newspaper in which the notice had been advertised once a week: the jury having nevertheless found a verdict against the proprietor, the Court refused a new trial. *Rouley v. Horne* 551

CHARITABLE TRUST—Gift for repair and enlargement of school.—A school-house, built prior to the 9 Geo. II. c. 36, on waste of a manor given by the lord for that purpose, and paid for by subscriptions from the lord of the manor and other parishioners, and never subsequently used otherwise than as a public school-house, is so dedicated to charity, and in mortmain, that a bequest for the purpose of repairing and enlarging it, and of providing a salary for a schoolmaster, is a valid legacy. *Ingleby v. Dobson* 118

And see Church.

CHURCH—1. Chapel of ease—Election of minister—Approval of vicar.—In 1631, A. M. founded a chapel of ease, and endowed it with lands for the maintenance of a minister, and by his will directed that his son should during his life have the nomination and election of the minister, and might by will or deed set down the order or course for the nomination and election of the minister after his death; and if he should not set down any course or order, then the minister should be nominated and elected by all the householders and heads of families in the township, and the heirs male of A. M.'s body, and such other of his kindred or blood as should have any land in the township, or the greater number of them. By the instrument of consecration all tithes, fees, and emoluments whatsoever on burials, marriages, &c. were reserved to the vicar of the parish. The son not having set down any order or course: Held, that the householders and heads of families in Astley had no right to present a curate to this chapel without the consent of the vicar.

It is a general rule of law, that where a chapel of ease has been erected within the time of legal memory, the incumbent of the mother church is entitled to the nomination of the minister, unless there has been a special agreement to the contrary, to which the parson, patron, and ordinary are parties. Per ABBOTT, Ch. J. *Farnworth v. The Bishop of Chester* . 390

— 2. **Election to benefice and mode of election.**—In an action for a false return to a writ of mandamus it was alleged to be a custom in a parish that whenever a certain perpetual curacy should be vacant by reason of the death of the curate or otherwise, the parishioners should elect a fit person to succeed him; and that a vacancy having occurred, plaintiff was duly elected by the parishioners according to the custom. At the trial it appeared that at a meeting of the parishioners duly convened for the purpose of such an election, it was decided before the election began that parishioners who had not paid church rates should not be allowed to vote. In consequence of this resolution, several persons who had the legal right of voting did not tender their votes, and the votes of others who did tender their votes were rejected,

on the ground that they had not paid the church rate: Held, that a party elected by the majority of the persons whose votes were received at this meeting was not duly elected by the parishioners according to the custom.

At the election every parishioner tendering a vote gave a card containing only the name of the candidate for whom he voted; semble, that this mode of election was illegal. *Faulkner v. Elger (or Elzer)* 317

CHURCH—3. Church-yard—Property in tombstone.—Though the freehold of the church-yard is in the parson, trespass lies for the erector of a tombstone against a person who wrongfully removes it from the churchyard and erases the inscription. *Spooner v. Brewster* 613

COLONY, Command of troops in. See *Army*, 1, 2.

COMMON.—Encroachment.—A. being possessed of a portion of a lammas field, over which a right of common existed part of the year, took down the customary post and rail fence containing gaps through which the commoners' cattle might pass, and built a wall, with a single doorway, at which they might enter and return: Held, that this was an encroachment. One farthing damages will sustain the verdict for the plaintiff in an action of trespass. *Kitchen v. Knight* 722

And see *Poor Law*, 7.

COMPANY.—Costs of obtaining special Act, Action for.—An Act of Parliament for incorporating a gas light company enacted, that all the costs of obtaining the Act should be paid and discharged out of the monies subscribed in preference to all other payments: Held, that the solicitors who obtained the Act might maintain an action of debt founded upon the statute for their costs. *Tilson v. Warwick Gas Light Company* 529

CONFLICT OF LAWS.—Foreign document—Construction.—An instrument, executed by foreigners in a foreign country, must, on a demurrer, be construed according to the obvious import of its terms, unless there are allegations in the bill that, according to the law of the country in which it was executed, the true construction of it is different.

A foreign sovereign may sue in English Courts. *The King of Spain v. Machado* 56

CONTRACT.—1. Agreement to take periodical work.—Upon a contract for twenty-four numbers of a periodical work, to be delivered monthly, at a guinea a number, a plaintiff may sue for the numbers actually delivered, although the contract be not reduced into writing, as required by the Statute of Frauds. *Mavor v. Pyne* 625

— 2. Divisibility of stipulations.—In assumpsit for the breach of an agreement, a clause contained therein although illegal as being in restraint of trade, if it form no part of the consideration, need not be set out in the declaration. *M'Allen v. Churchill* 680

— 3. Secret bargain—Appointment to office.—A., who held an office for life in the gift of B., agreed with C. to resign, and to procure the appointment for him, and C., in consideration thereof, agreed that A. should have a moiety of the profits. A. resigned, and through his influence C. was appointed, and executed a deed for the performance of the agreement. The agreement was not communicated to B. In covenant by A. against C. for not paying over to him a moiety of the profits of the office: Held, that the agreement was a fraud upon B., and therefore illegal and void. *Waldo v. Martin* 289

— 4. Breach of promise of marriage. See *Marriage*.

— 5. Clothes supplied to infant, Implied contract of father to pay for. See *Infant*, 1.

CONTRACT—6. Compromise — Acceptance of composition. *See Bill of Exchange, 1.*

— 7. Enforcement of penalty. *See Partnership, 5.*

— 8. Specific performance—Action by Infant. *See Infant, 5.*

And see Vendor and Purchaser.

COPYHOLD.—1. Title to. *See Vendor and Purchaser, 4.*

— 2. Undertaking to surrender. *See Vendor and Purchaser, 7.*

CORPORATION (MUNICIPAL).—1. Election of mayor—Validity. —Information in the nature of a *quo warranto* for usurping the office of Mayor of Monmouth. Plea that defendant was duly elected according to the governing charter of the borough. Replication that there were two candidates; that 50 good votes, tendered for the losing candidate, were improperly rejected; and that 38 persons, who had been unduly elected, and admitted as burgesses, were received as voters for the defendant, and that a majority of the legal votes tendered was in favour of the other candidate. On demurrer, held that the replication was bad, for that it was only an argumentative and not a direct denial of the validity of the defendant's election, and also for that it attempted to put in issue the title of the electors (*corporators de facto*), which cannot be done in an information against the elected. *Rex v. Hughes* 296

— 2. Ouster on *quo warranto*—Mandamus for new election. *See Mandamus.*

COSTS.—1. Of obtaining special Act. *See Company.*

— 2. Of ante-nuptial settlement. *See Husband and Wife, 3.*

— 3. In action for specific performance. *See Vendor and Purchaser, 2.*

And see Practice, 1—3.

COVENANT—1. In restraint of trade, Breach of. *See Restraint of Trade.*

And see Landlord and Tenant; Settlement (Marriage).

COUNSEL. *See Barrister.*

CRIMINAL LAW—1. Recognizances, Estreat of.—The statutes 3 Geo. IV. c. 46, and 4 Geo. IV. c. 37, do not oust the Court of Exchequer of its jurisdiction, where forfeited recognizances have been actually estreated into it from an inferior jurisdiction. *Ex parte Jonathan Pellow* . . . 683

— 2. — Mitigation of penalty.—Where the Court refuse to discharge a recognizance, they have power to mitigate the penalty. *In re Hooper* 745

— 3. Manslaughter—Justifiable homicide.—A person set to watch a yard or garden is not justified in shooting any one who comes into it in the night, even if he should see the party go into his master's hen-roost. But if from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him. *Rex v. John Scully* 780

— 4. — Reckless Driving.—If a person is driving a cart at an unusually rapid pace, and drives over another, and kills him, he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so if he had not been drunk. *Rex v. William Walker* 781

— 5. Recognizance of infant—Validity of.—*See Infant, 2.*

CROSS-REMAINDER—Implication of in deed.—Cross-remainders cannot be implied in a deed, and are not created as to accruing shares by a limitation of the entire estate to an only surviving child and his issue, or by a gift over of the entire estate in remainder after the failure of all issue, or by an express creation of cross-remainders as to the original shares. *Edwards v. Alliston* 9

DEED—"Date"—Day of date or of delivery.—Where a deed has no date, or an impossible date, as the 30th February, and in the deed reference is made to the *date*, that word must be construed *delivery*, but if it has a sensible date, the word "date" occurring in other parts of the deed, means the day of the date and not of the delivery. *Styles v. Wardle* 501

DEFAMATION—1. Imputation of professional ignorance.—Plaintiff, a surgeon; petitioned Parliament against quacks.

Defendant, a journalist, commented severely on the contents of the petition, and charged the plaintiff with ignorance of his profession, pointing out ignorance of chemistry, which, he said, appeared on the face of the petition.

Plaintiff then sued defendant for libelling him in his profession of a surgeon; the Judge directed the jury, that if they considered the defendant's attack a fair comment on the plaintiff's petition, if the charge of ignorance was collected from the petition alone, and was not the spontaneous effusion of malice in the defendant, the writing in question was no libel; he also directed them to consider whether the defendant had imputed to the plaintiff ignorance in his profession of a surgeon, or ignorance of chemistry, for if they thought the latter, the declaration was not adapted to the plaintiff's case.

The jury having found a verdict for the defendant, the Court granted a new trial, costs to abide the event.

Quære, Whether a petition to Parliament on matters of general importance is such a publication as renders the petition an object of fair criticism and comment. *Dunne v. Anderson* 591

— 2. Newspaper evidence of publication of libel.—The delivery of a newspaper to the officer at a Stamp Office is a sufficient publication to sustain an indictment for a libel in that paper. *Rex v. Amphitt* 206

— 3. Subsequent publication by counsel.—*Semble*, that although it be lawful for a counsel in the discharge of his duty to utter matter injurious to individuals, yet the subsequent publication of such slanderous matter is not justifiable, unless it be shewn that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence. *Flint v. Pike* 335

— 4. Pleading—Libel true "in substance."—In an action for a libel which purported to be a report of a trial, the defendant pleaded that the supposed libel was *in substance* a true account and report of the trial: Held, upon demurrer, that this plea was bad. *Flint v. Pike* 335

— 5. Slander—Imputation of fraud in business.—To say (in the presence of others) of one who carries on the business of a corn vendor, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for," is actionable, and entitles him to a verdict without proof of special damage. *Thomas v. Jackson* 603

— 6. — Malice.—In an action for words spoken of the plaintiffs in their trade as bankers, it was proved that A. B. met the defendant and said, "I hear that you say that the plaintiffs' bank at M. has stopped. Is it true?" Defendant answered, "Yes, it is. I was told so. It was so reported at C., and nobody would take their bills, and I came to town in consequence of it myself." It was proved that C. D. told the defendant that there was a run upon the plaintiffs' bank at M. Upon this evidence, the Judge, after observing that the defendant did not appear to have been actuated by any ill will against the plaintiffs, directed the jury to find their verdict for the

defendant if they thought the words were not maliciously spoken: Held, upon motion for a new trial, that although malice was the gist of the action for slander, there were two sorts of malice, malice in fact and malice in law; the former denoting an act done from ill will towards an individual; the latter a wrongful act intentionally done, without just cause or excuse; and that in ordinary actions for slander, malice in law was to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but in actions for slander, *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved: Held, therefore, that the Judge ought first to have left it as a question for the jury, whether the defendant understood A. B. as asking for information, and whether he had uttered the words merely by way of honest advice to A. B. to regulate his conduct, and if they were of that opinion, then, secondly, whether in so doing he was guilty of any malice in fact. *Bromage v. Prosser* 241

DISTRESS—For Rent-charge.—Devise of lands to A. for life, remainder to B. in fee, subject to and charged with the payment of 20*l.* a year to C. D. during her life, to be paid by A. as long as she should live, and after her decease to be paid by B.: Held, a charge on the land, for which C. D. might distrain. *Buttery v. Robinson* 656

And see **Landlord and Tenant**, 7—12.

EASEMENT—Grant for limited time.—Where an easement has been, in consideration of a money payment, granted for a term of years, and the term is expired, the continued use by the grantee or those claiming under him with the permission of the person claiming under the grantor, of the easement, is a good consideration for, and a ground for applying, a promise to pay a reasonable sum for the privilege; although the use of the easement has ceased to be a detriment to the estate of the grantor. *Davis v. Morgan* 193

ELECTION—To office. See **Mandamus; Corporation (Municipal)**.

ESTATE—Tenancy by curtesy—Title of husband. *Buckworth v. Thirkel* 674

— **For life.** See **Tenant for Life**.

And see **Will**.

ESTOPPEL—Officer's pay—Set-off. See **Army**, 3.

EVIDENCE — 1. **Cross-examination** — Evidence affecting third party.—Witnesses cannot be cross-examined to facts not in issue, if such facts are injurious to the characters of persons not connected with the cause. *Bate v. Hill* 766

— 2. **As to character.**—In seduction cases the plaintiff's counsel may call witnesses to the general good character of the party seduced, if her character has been attacked in cross-examination. *Bate v. Hill* 766

— 3. **Confidential communication—Retainer of counsel.**—A party will not be allowed to go into evidence of the time when the counsel for the opposite party was retained, either by calling the counsel's clerk or otherwise; as the retaining of counsel falls within the rule respecting confidential communications. *Foot v. Hayne* 788

— 4. **Documentary—Affidavit by foreigner—Interpretation—Form of Jurat.**—By the jurat to an affidavit of debt made by a foreigner, it was certified by the signer of the bills of Middlesex that the affidavit was interpreted by J. C., professor of languages, (he having first sworn that he understood the English and French languages,) to the deponent, who was afterwards sworn to the truth thereof: this was held to be sufficient. *Boac v. Solliers* 294

EVIDENCE.—5. Documentary—Contradictory—Given in other proceedings.—**Certified copy of answer.**—Where a witness in a trial at law gave evidence at variance with what he had previously sworn in an answer in Chancery: Held, that an examined copy of that answer was admissible to contradict him, and that it was not necessary to produce the original answer. *Ewer v. Ambrose* 198

— **6. — Letters—Breach of promise of marriage—Statements in father's letters.**—If, in an action for breach of promise of marriage, the defence set up is, that the defendant was induced to make the promise through misrepresentations made to him; and it is proved that the plaintiff knew that her father wrote letters to the defendant, in which he made statements respecting her, those letters are evidence for the defendant, although there is no proof that the plaintiff had read them, or was acquainted with their exact contents: but the plaintiff would not be considered answerable for the particular expressions contained in them.

A verbal representation made by the plaintiff's father (she not being present) to a third person, who communicated it to the defendant, is not evidence. *Foote v. Hayne* 788

— **7. — Notice of line of defence—Evidence to rebut defence.**—In an action for breach of promise of marriage if the defendant's counsel cross-examines as to certain misrepresentations made towards the defendant, and deceptions practised on him; this is to be considered as notice to the plaintiff's counsel of the line of defence; and therefore if he has letters of the defendant, tending to show that he knew the real state of the facts, the plaintiff's counsel ought to give them in evidence before the plaintiff's case is closed, and he will not be allowed to put them in as evidence in reply. *Wharton v. Lewis* 785

— **8. — Revenue books.**—On an ejectment for a house, the land tax assessment of the parish in which the collector of taxes charges himself with the receipt of money from A. B. as tenant of a particular house, is evidence that A. B. was tenant at that time. *Doe d. Smith v. Cartwright* 774

— **9. — Insurance company's books.**—The books of an insurance company, in which they charge themselves with the receipt of a sum of money as a premium to insure from fire a particular house in the occupation of A. B., are evidence of his occupation. These entries are evidence, because the party making them charges himself with the receipt of money. *Doe d. Smith v. Cartwright* 774

— **10. — Sheriff's warrant, Production of.**—Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff while the sheriff was yet in office, and the bailiff, upon being called as a witness, did not produce it: Held, that proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents. *Taplin v. Atty* 616

— **11. — Unstamped counterpart of duly stamped agreement.**—The plaintiff had lost his part of an agreement under seal after it had been duly stamped. At the trial of an action on the agreement, the defendant, upon notice, produced his part unstamped, and the plaintiff, the draft of the agreement: Held, that the defendant's part, unstamped, might be received in evidence. *Munn v. Godbold* 628

EXECUTOR AND ADMINISTRATOR—1. Administration suit—Advance to claimants on account.—Persons who were found by the Master to be the next of kin of the intestate, and were named by the Court to be defendants in an issue directed to try the rights of other persons, who claimed also to be next of kin, were allowed a sum of 500*l.* out of the estate of the intestate, on giving security to account for it. *Gregg v. Taylor* . 87

— **2. Legacy to executor.**—A testator gives a legacy to his friend and partner P.; and he afterwards appoints him one of his executors, and gives

him other benefits much greater than those bequeathed to any of the other executors: the legacies bequeathed to P. are not be considered as bequeathed to him in his character of executor. *Cockerell v. Barber* . . . 181

EXECUTOR AND ADMINISTRATOR.—3. **Indian assets, Commission on.**—An executor in India collecting assets in India is entitled to a commission of 5 per cent. even upon assets collected for the payment of legacies given to himself.

He is entitled also to his commission, though part of the assets are in the hands of a mercantile house in which he is a partner, and in which the testator was at the time of his death a partner. *Cockerell v. Barber* . 181

— 4. **Marshalling assets as against devisee.**—If the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate. *Selby v. Selby* . . . 117

— 5. **Award against estate—Promise to pay.** See **Arbitration**, 3.

And see **Rent-charge**.

EXTENT—Ambiguity in affidavit.—An affidavit for an immediate extent in chief against a bond-debtor to the Crown, should contain a distinct, positive, and unequivocal allegation of a breach of the bond; therefore where the allegation of the breach in the affidavit was ambiguous, an extent issued against one of the obligors in a bond to the Crown was set aside, and the Sheriff ordered to deliver the goods.

But where the extent is issued against a surety, the affidavit need not state that application has been made to the principal debtor for payment; or that he is in decayed and insolvent circumstances to the assignee under a commission of bankruptcy sued out after the *teste* of the extent.

A second extent having subsequently issued upon a sufficient affidavit: Held, that the assignees were entitled to the property, although the sheriff had not, at the time of the *teste* of the latter extent, actually delivered the goods according to the order of the Court. *R. v. Marsh* . . . 748

FALSE IMPRISONMENT.—1. **Arrest by Constable—Delay in bringing before Magistrate.**—A constable arresting a man on suspicion of felony must take him before a justice to be examined as soon as he reasonably can, therefore a plea justifying a detention for three days, in order that the party whose goods had been stolen might have an opportunity of collecting his witnesses and bringing them to prove the felony, was held bad on demurrer. *Semble*, that a constable cannot justify handcuffing a prisoner unless he has attempted to escape, or unless it be necessary in order to prevent his doing so. *Wright v. Court* . . . 418

— 2. **Illegal Arrest—Production of warrant.**—A party who sues another for arresting him on an illegal warrant is not bound to produce the warrant. *Holroyd v. Doncaster* . . . 672

— 3. — **Malice.**—Where a person having lost a bill of exchange, which he supposes to have been stolen, goes before a magistrate, and relates the circumstance of the loss, and the magistrate grants his warrant to apprehend A. B. on a charge of having “feloniously stolen, taken and carried away” the bill of exchange, (language which the complainant did not use when he laid his information), and upon subsequent investigation of the case it turned out to be no felony: Held, that no ground existed for inferring malice on the part of the complainant, and no cause of action against him. *Cohen v. Morgan* . . . 533

FINE.—**Levied by husband and wife—Extinguishment of power of sale.**—By a marriage settlement an estate was limited to the use of husband and wife successively for life, with remainders over to the children of the

marriage, and in default of issue, to the right heirs of husband and wife. There was a power in husband and wife to charge the estate during their lives, and a power to certain trustees, in whom the legal estate was vested, to sell on the direction of the husband and wife or the survivor.

The husband and wife borrowed money by way of annuity; created a term of 1,000 years, and levied a fine to G. in fee, which, by a deed to lead the uses, was declared to be "in trust to secure the regular payment of the annuity, and to corroborate the said term:" Held, that this fine did not extinguish the trustees' power to sell under a direction as above. *Tyrell v. Marsh* 577

FOREIGN JUDGMENT.—Irish judgment, Action on.—A judgment obtained in one of the superior courts in Ireland since the Union is not a record in England, but is, in effect, a foreign judgment. *Harris v. Saunders* 310

FOREIGN LAW—Proof of. See Husband and Wife, 2.

FRAUDS, STATUTE OF. See Solicitor and Client, 4; Landlord and Tenant, 15.

GAME.—Right of sporting—Presumption of grant.—Trespass for breaking and entering two closes, parcel of Forton Farm. Plea, that one J. W. before and at the time when, &c., was seised in fee of 50 acres of land next adjoining the *locus in quo*, and that by deed of the 17th of February, 1736, between F. C. who was seised in fee of the *locus in quo*, and one R. W. who was seised in fee of the 50 acres, F. C. granted to R. W. and his heirs and assigns, for the time being owners in fee of the 50 acres, the liberty and privilege of hunting for game with dogs in the *locus in quo*. The plea then justified the trespass as the servant of J. W. Replication, that F. C. did not grant the liberty and privilege as in that plea mentioned, upon which issue was joined. At the trial there was no proof of any such grant as that stated in the plea, but it appeared that by a deed of that date R. W., being then seised in fee of the manor of Middleton, conveyed Forton Farm to F. C., reserving all royalties; but it appeared further that from the year 1753 the gamekeepers of the lord of the manor of Middleton were accustomed to sport over Forton Farm with the knowledge of the plaintiff and his landlords the owners of Forton Farm; that about 14 years ago the plaintiff by desire of his landlord gave notice to the then gamekeeper of the lord of the manor not to trespass, but he afterwards continued to sport there by order of the lord, without any further interruption: Held, that upon this evidence a jury ought not to have presumed a grant. *Pickering v. Noyes* 430

GOODS, Sale of. See Sale of Goods.

GRANT of right of sporting, Presumption of. See Game.

HABEAS CORPUS.—Where a prisoner is brought up under a *habeas corpus* issued at common law, he may controvert the truth of the return by virtue of the 56 Geo. III. c. 100, s. 4. *Ex parte Beeching* 224

HORSE, Sale of. See Sale of Goods, 5.

HUSBAND AND WIFE.—1. Husband's liability for necessaries—Wife leaving husband, through apprehension of personal violence.—Where a wife leaves her husband under such an apprehension of personal violence as a jury shall esteem to have been reasonable, her husband is liable for necessaries furnished for her support. *Houlston v. Smyth* 609

— 2. Trading in partnership in foreign country—Who may sue.—Husband and wife, trading as partners in Spain, cannot sue as such in our courts, without proof being given that by the law of Spain a married woman is allowed to trade. Whether on such proof an action could be maintained by both—*Quare*. *Cosio v. De Bernales*. 775

HUSBAND AND WIFE—3. Ward of court—Costs of ante-nuptial settlement.—The husband's costs of the proceedings in making a settlement of the fortune of a ward, whom he had married without the leave of the Court, were allowed to him out of the fund, he having no property of his own, and there being no circumstances of aggravation in his conduct. *Anon.* 155

— 4. Marriage settlement—Levy of fine—Extinguishment of power. *See* Fine.

— 5. Post-nuptial settlement—Exercise of power—Bankruptcy of husband. *See* Bankruptcy, 1.

And see Estate.

INFANT.—1. Liability of father for clothes supplied to son.—A father is not bound to pay for clothes furnished to his son without some contract, express or implied, on his part to do so. *Fluck v. Tollemache* 765

— 2. Recognizance to prosecute.—A person of the age of sixteen is competent to enter into a recognizance conditioned to prosecute on a criminal charge; and if it be forfeited and estreated, the Court will not discharge it, unless a sufficient case for relief be made out. *Ex parte Williams* . 735

— 3. Steps taken by guardian to prevent elopement.—Guardians of a female under age are justified in stopping her elopement, and in detaining her clothes if she has eloped; and a carrier by whom she has sent them is justified in delivering them up to the guardians. *Barker v. Taylor* . 767

— 4. Suit by parent for injuries to child—Loss of service.—Trespass for driving a carriage against the plaintiff's son and servant, whereby plaintiff was deprived of his services and was put to expense in obtaining his cure. The child was two years and a half old, and the plaintiff might have placed him in an hospital which would not have occasioned any expense, but preferred having him at home: Held, that the loss of service was the gist of the action, and that the child being incapable of performing any service by reason of his tender age, the action was not maintainable, particularly as no expense had been necessarily incurred. *Hall v. Hollander.* 437

— 5. Suit for specific performance by.—An infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. *Flight v. Bolland* 101

INJUNCTION—To restrain transfer of stock. *See* Bankruptcy, 1.

INN OF COURT—Admission of student—Mandamus.—The Court will not grant a mandamus to compel the benchers of one of the Inns of Court to admit an individual as a member of the society with a view to his qualifying himself to be called to the Bar. *R. v. The Benchers of Lincoln's Inn* 482

INSURANCE (MARINE)—1. Deviation.—Assumpsit on a policy of insurance on freight of a ship at and from Grenada to London. It was proved that there is only one custom-house for the whole island of Grenada, that the vessel arrived in safety at Grenada and discharged part of her outward cargo at three different bays, and she was proceeding to a fourth to discharge the residue of her outward cargo and take in part of her homeward cargo, when she was lost by perils of the sea: Held, that the vessel at the time of the loss was proceeding to the fourth bay for a purpose connected with the voyage insured, and consequently that it was no deviation, and the underwriter was liable. *Warre v. Miller* 382

— 2. Insurance on freight—Damage to cargo—Sale by master—Liability of underwriters for loss of freight on goods sold.—In an action on a policy of insurance on freight it appeared that the ship in the course of her voyage having been injured by a peril of the sea, was obliged to put into a port and land the whole of her cargo. Part of the cargo

had been wetted by sea water, and could not be re-shipped without danger of ignition, unless it had been subjected to a lengthy process, which would have been attended with expense equal to the freight. Under these circumstances the master sold these goods, and finding he could not obtain others, he sailed on his voyage, and arrived at his port of destination with the rest of his cargo. The master's proceedings were such as a prudent man uninsured would have adopted: Held, that the underwriters were not liable for the loss of the freight of these goods. *Mordy v. Jones* . . . 305

INSURANCE (MARINE)—3. "Stranding."—Where, in assumption on a policy of insurance on goods warranted free from average, unless the ship were stranded, it appeared that in the course of the voyage the ship was, by tempestuous weather, forced to take shelter in a harbour, and in entering it struck upon an anchor, and being brought to her moorings, was found leaky and in danger of sinking, and on that account was hauled with warps higher up the harbour, where she took the ground and remained fast there for half an hour. Held, that this was a stranding within the meaning of the policy. *Barrow v. Bell* . . . 468

IRELAND—Irish judgment. See Foreign Judgment.

JOINTURE. See Settlement (Marriage).

JURY—Refusal of bailiff to summon—Fine.—By letters patent reciting that the liberty of H. was an ancient liberty, and that the lords were bailiffs of the same, and had exercised returns and executions of writs and processes within the liberty, the King granted to A. B. his heirs and assigns, that he should have within the liberty of H. the return and execution of all writs, processes, and precepts of his Majesty, by the lords' proper bailiffs, officers, and ministers, so that no sheriff of the King, his heirs or successors, should enter into the liberty to execute any thing, unless it touched his Majesty or his Crown, or in default of the lords' bailiffs and officers. The bailiffs of the liberty had regularly attended the Quarter Sessions, and made returns of the jurors resident within the liberty: Held, that the bailiff of the liberty was bound in obedience to the precept of the sheriff, to summon the jury within the liberty, to attend the Quarter Sessions.

The Court of Quarter Sessions made an order, that A. B. the acting bailiff of the lordship of H. be fined 10*l.* for refusing contrary to the duty of his office, and to ancient usage, to summon the jury from the lordship to attend at the Quarter Sessions, he the said A. B. having been duly required so to do by warrant from the sheriff: Held, that this order was good, although it did not appear that the bailiff was summoned to attend at the Sessions, it being his duty to do so without summons. *R. v. John Jaram* . . . 450

LANDLORD AND TENANT—1. Agreement for lease—Liability of agent.—If a man describe himself, in the beginning of an agreement to grant a lease, as making it on behalf of another, but in the subsequent part of it say that he will execute the lease, he is personally liable. *Norton v. Heron* . . . 797

— 2. Breach of covenant—Forfeiture—Waiver.—Where a lease contained covenants to keep the premises in repair, and to repair within three months after notice, and a clause of re-entry for breach of any covenant, and the premises being out of repair, the landlord gave a notice to repair within three months: Held, that this was a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months. *Doe d. Morecraft v. Meux* . . . 426

— 3. — Commencement of term—Date of deed.—In covenant on an indenture dated the 24th December, 1822, whereby plaintiff, in consideration of 94*l.* leased to defendant a house and premises for ninety-seven years, subject to an agreement for an underlease to A. for twenty-one years, and the defendant covenanted that he would, within twenty-four calendar months

then next after the date of the indenture, procure A. to accept a lease of the premises for the term of twenty-one years from Christmas Day, 1821; and that in case A. would not accept the lease, that he, defendant, would, within one calendar month next after the expiration of the said twenty-four calendar months, pay to the plaintiff a certain sum of money: it was held, that the deed took effect from the day of the date, and that A. not having accepted the lease, defendant was liable to pay the stipulated sum of money at the expiration of twenty-five calendar months from the date of the deed. *Styles v. Wardle* 501

LANDLORD AND TENANT—4. Breach of covenant—Covenant for quiet enjoyment—"Term."—A. being seised in fee of an estate, by lease and release executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives. A. afterwards granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor; and there was a covenant that the lessee should quietly hold and enjoy the premises *for and during the said term*, without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors. The lease being for three lives absolutely, was not conformable to the power, and became void on the death of A., and his eldest son brought an ejectment and evicted the lessee, two of the *cestuy que vies* being then living: Held, that the eldest son was a person claiming under the lessor within the meaning of the covenant for quiet enjoyment. Held, secondly, that by the words, "during the said term" in that covenant, the parties intended a term to continue so long as any of the *cestuy que vies* survived, and not a term to continue only for the life of the grantor. *Evans v. Vaughan* 250

— 5. **Commencement of term—Lease executed after day of date.**—A lease purported on the face of it to have been made on the 25th March, 1783, habendum to the lessee from the 25th March now last past for thirty-five years. There was evidence to shew that the lease was not executed until after the 25th March, 1783: Held, that it took effect from the time of delivery, and not from the day of the date, and consequently that the term commenced on the 25th March, 1783, and not on the 25th of March preceding the date of the deed. *Steele v. Mart* 256

— 6. **Determination of tenancy—Intermediate letting to another tenant—Waiver of surrender.**—Where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant: Held, that she could not recover in an action for use and occupation against the lessee for a subsequent portion of the year during which the apartments had been unoccupied:

Held, also, that by the admission of another tenant she dispensed with the necessity of a written surrender. *Walls v. Atcheson* 657

— 7. **Distress for rent.**—By agreement, as well as by custom of the country, a tenant was to have the use of the barns and gate-rooms to thrash out his corn and fodder his cattle till the May Day after the expiration of his term; his term expired at Michaelmas, 1824; he was then restrained by injunction from carrying off the premises corn in the straw: in January, 1825, his landlord distrained a rick of corn on the premises: Held, that the distress was valid. *Knight v. Benett* 643

— 8. — **Oral agreement for lease—Amount of rent not agreed upon.**—Plaintiff entered a farm under an oral agreement for a lease for ten years; though the time of paying rent was settled, it did not appear what was the amount to be paid; the lease was never executed: but plaintiff occupied according to the terms of the proposed lease, and paid a certain rent for two years: Held, that the lessor might distrain. *Knight v. Benett* 640

LANDLORD AND TENANT.—9. Distress for rent—Fraudulent removal to avoid distress.—An order and adjudication, founded on 11 Geo. II. c. 19, s. 4, for fraudulently and clandestinely removing goods and chattels, not exceeding the value of 50*l.*, to avoid a distress for rent, need not enumerate or specify the particular goods and chattels alleged to have been removed. *R. v. Rabbitts* 542

— 10. — **Joint lease by husband and wife—Rent accruing after wife's death—Tenancy by the curtesy—Estoppel.**—To an action upon covenant for rent, brought by the plaintiff after the death of his wife against a tenant, under a lease by the plaintiff and his wife, in which the reddendum and covenant for payment were taken in favour of the plaintiff and his wife and the heirs or assigns of the wife, the defendant pleaded that the premises were the estate of the wife, and that the plaintiff had nothing in them but in right of his wife; that on, &c., she died without issue, leaving J. A. her heir, whereupon all the estate of the plaintiff ceased, and J. A. threatened to evict the plaintiff unless he attorned, whereby he was compelled to attorn and become tenant to J. A.: Held, on demurrer, that the plea was good, for that, some interest having passed by the lease from plaintiff and his wife, it could not work by estoppel, and the defendant was therefore entitled to shew that the plaintiff's interest had ceased, and that he had attorned to J. A. upon demand, which was equivalent to an eviction. *Hill v. Saunders* 375

— 11. — **Tenant holding over after expiration of tenancy.**—Where a tenant, by permission of the landlord, remained in possession of part of a farm after the expiration of the tenancy: Held, that the landlord might distrain on that part within six months after the expiration of the tenancy, the 8 Ann c. 14, ss. 6, 7, not being confined to a tortious holding over or to the holding of the whole farm. *Nuttall v. Staunton* 207

— 12. — **Double rent.**—Held, secondly, that the tenant having holden over after the expiration of the time mentioned in the notice to quit, the landlord was not entitled to distrain for double rent under the statute 11 Geo. II. c. 19, s. 18, inasmuch as that statute applied to those cases only where the tenant had the power of determining his tenancy by a notice, and where he actually gave a valid notice sufficient to determine it. *Johnstone v. Hudlestone* 505

— 13. **Lease for lives—Covenant for renewal—Failure to comply with condition—Forfeiture.**—The assignee of a lease for lives, which contained a covenant for renewal upon the dropping of any life, provided application were made within six months, having omitted, upon the death of one of the *cestuis que vie*, to apply for a renewal within the six months, filed his bill praying relief, upon the ground that he did not, within the six months, know that the person was dead, or that the deceased person was one of the *cestuis que vie* named in the lease: The bill was dismissed with costs, because the plaintiff might have known the facts, if he had used reasonable diligence, and acted with ordinary prudence. *Harries v. Bryant* 15

— 14. — **Covenant in a lease for perpetual renewal, upon notice within one year next, after the death of any, or either of the life or lives: informal notice about five years after the dropping of the first life, with an allegation of accident, and ignorance of rights, and a regular application after the determination of the second and third lives, both within one year; lessee held not entitled to a renewed lease, determinable on either three or two lives, with a similar covenant, but bill retained for a year, with liberty to bring an action at law.** *Maxwell v. Ward* 725

— 15. **Notice to quit—Yearly tenancy.**—A tenant held under a demise from the 26th day of March for one year then next ensuing, and fully to be complete and ended, and so from year to year, for so long as the landlord and tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord less than six months before the 25th day of March, that he would quit on that day, and

the landlord accepted and assented to the notice: Held, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law, within the meaning of the Statute of Frauds. *Johnstone v. Hudleston* 505

LEASE—Execution after day of date—Commencement of term. See *Landlord and Tenant*, 5.

— For lives. See *Landlord and Tenant*, 13, 14.

LICENSING—Charge alleged in the alternative—"Beer or ale."—Information on 48 Geo. III. c. 143, for selling "beer or ale" without an excise license, is bad, and a conviction thereon, shewing that the defendant had sold ale only, quashed. *R. v. North* 538

LIEN of Agent. See *Principal and Agent*, 3.

LIMITATIONS (STATUTE OF)—Acknowledgment by letter.—The following letter from the defendant to plaintiff's attorney, was given in evidence by a plaintiff in answer to a plea of the Statute of Limitations. "I have received yours respecting plaintiff's demand; it is not a just one; I am ready to settle the account whenever plaintiff thinks proper to meet on the business; I am not in his debt 90*l.*, nor anything like that sum; shall be happy to settle the difference by his meeting me:"

Held, that the Judge was justified in directing the jury, "that after this letter the Statute of Limitations was out of the question." *Colledge v. Horn* 606

LUNACY.—Ambiguous finding of commission.—Under a commission of lunacy, the jury found, "that the party is not a lunatic, but that, partly from paralysis and partly from old age, his memory is so much impaired as to render him incompetent to the management of his affairs, and consequently, of unsound mind, and that he has been so for the term of two years last past." The inquisition was quashed, and a new commission was ordered to issue.

The Court will protect the property of a supposed lunatic in the interval between the presenting of a petition for a commission of lunacy, and the finding of the jury; but it will, at the same time, take care that ample means for resisting the commission be furnished to those who act in the inquiry on the alleged lunatic's behalf.—*In re Holmes* 42

MALICE.—Abuse of process.—A plaintiff is bound to accept from a defendant in custody under a *ca. sa.* the debt and costs, when tendered in satisfaction of his debt, and to sign an authority to the sheriff to discharge the defendant out of custody. And an action on the case will lie against a plaintiff for having maliciously refused so to do; and the refusal to sign the discharge is sufficient *prima facie* of malice in the absence of circumstances to rebut the presumption.—*Crozer v. Pilling* 199

MANDAMUS.—To elect to office.—Where a defendant is ousted on *quo warranto*, the prosecutor is entitled to the writ of mandamus for a new election, if he applies in reasonable time. If he does not the defendant is entitled to move for the writ.—*R. v. McKay* 436

And see *Inn of Court*; *Poor Law*, 8.

MARRIAGE.—Breach of promise—Misrepresentation and fraud.—In an action for breach of promise of marriage, if it appear that the defendant was induced to make the promise, or to continue the connection, either by misrepresentation or wilful suppression of the real state of the circumstances of the family and previous life of the plaintiff; this goes in bar of the action, and not to the damages only.—*Wharton v. Lewis* 785

— Breach of Promise—Evidence in action. See *Evidence*, 6.

MARSHALLING ASSETS. *See* Executor and Administrator 4.

MORTGAGOR.—1. Foreclosure action—Enlargement of time for redemption.—A first application by a mortgagor to enlarge the time for payment of the mortgage money refused.—*Nanny v. Edwards* . . . 24

— 2. Mortgagee in possession—Rents received more than sufficient to repay principal and interest—Interest on balance—Costs.—Mortgagee let into possession by the mortgagor till he should be paid the sum lent and interest, overpaid in two, and holding over thirty-four years longer, charged with the balance, and interest from the date of a notice to pay the receipts to a prior mortgagee.

Only 4 per cent. interest allowed, though the overpaid mortgagee had purchased two small shares of a prior mortgage on the same estate which had been paid off with interest at 5 per cent.

Mortgagee in possession held entitled to costs incurred by him in that character, but charged with the costs of subsequent proceedings, rendered necessary by his conduct when overpaid. *Archdeacon v. Bowes* . . . 685

— 3. Mortgagees' right to rents paid into Court by receiver.—A mortgagee has no title to the rents of the mortgaged premises, which have been paid into Court by a receiver appointed in a suit for establishing the will of the mortgagor; notwithstanding that, after the appointment of a receiver, he gave notice to the tenants to pay the rents to him. He ought to have followed up that notice by moving to discharge the receiver. *Thomas v. Brigstocke* . . . 4

NEGLIGENCE—Injury to child—Suit by parent—Loss of service. *See* Infant, 4.

— Of carrier. *See* Carrier.

OFFICE, APPOINTMENT TO—Secret bargain. *See* Contract, 3.

OFFICER. *See* Army.

OVERSEERS—Corporate capacity of. *See* Poor Law, 2.

PARTNERSHIP—1. Authority of partner—Submission to arbitration.—Partnership in a trading firm does not of itself constitute an implied authority for one partner to bind the others by a submission to arbitration, even of matters arising out of the business of the firm. *Stead v. Salt* . . . 602

— 2. Dissolution—Custody of Books.—Where a partnership has expired by effluxion of time, and in a suit for an account, &c. a receiver has been appointed before decree, the Court will not compel the defendant, the former managing partner, to deliver up to the receiver, for the purpose of making out bills of costs, partnership books, and accounts, which have remained in his hands, and title deeds belonging to a third party, which came into the possession of the co-partners as solicitors, the defendant offering the receiver free access thereto, and to assist in making out the bills. *Dacie v. John* . . . 706

— 3. — Carrying on business after—Land bought in name of one partner—What is partnership property.—Where a partnership was dissolved, and, after the dissolution, one of the partners, without the consent of the other, continued in possession of the partnership effects, and carried on the same business on the same premises, in the course of which the specific effects that belonged to the partnership were, in whole or in part, consumed, and replaced by others: Held, that the effects which were found on the premises, and with which the business was carried on at the date of a decree declaring the partnership to have been dissolved, were not partnership property. *Nerot v. Burnand* . . . 65

PARTNERSHIP—4. Dissolution—Continuing authority of partner after.—A general dissolution of partnership between A. and B. does not operate to discharge A. from his responsibility for the subsequent conduct of B. in respect of the engagements of the partnership with third persons, made prior to the dissolution.

If A. and B., as partners, engage in a speculation with C., A. is answerable to C. in respect of the dealings of B. in the joint speculation. *Ault v. Goodrich* 151

— 5. **Party appointed to sue on behalf of firm.**—Where several persons jointly interested agreed to horse a coach, each of them one stage, on the road from L. to B., and that, in case of default, one of them should sue the defaulter for a penalty which should be divided among the non-defaulters: Held, that an action might be maintained on the agreement, against the defaulter, by the party so appointed to sue, and that the others need not join in the action.

But an agreement between members of a firm could not, as against a person not a party to the agreement, give authority to one of the firm to sue on behalf of the firm. Per BEST, Ch. J. *Radenhurst v. Bates* 659

— 6. **Pledge of partnership property—Goods held on joint account.**—A., a merchant in London, by letter, directed B., a broker in Liverpool, to purchase 1,000 bales of cotton, and stated that B. was to be allowed to be one-third interested therein, acting in the business free of commission. B. agreed to purchase the cotton, and to hold one-third interest therein, charging no commission. B. purchased the cotton, and in the subsequent correspondence, which continued for upwards of three months, the transaction was referred to as a joint account, joint concern, joint purchase, joint speculation, joint cotton adventure. B. transmitted policies of insurance against loss by fire to A., and stated that the cotton was deposited in rooms rented by him (B.), and that he held the key for their joint security: Held, that B. was interested as a partner in the cotton, and consequently that a pledge of the whole by him, without any fraud or collusion on the part of the pawnee, gave a right to the pawnee to hold the goods as against A. *Reid v. Hollinshead* 488

— 7. **Firms with common partner—Proof.** See **Bankruptcy**, 3.

— 8. **Husband and wife trading abroad in partnership.—Right to sue.** See **Husband and Wife**, 2.

PAYMENT—Appropriation of.—If a party who owes money to another on two different accounts makes a payment generally, the party receiving it may apply it to either account. It is not necessary, however, that the person paying the money should declare the appropriation of it at the time of payment: it is sufficient, if it can be collected from other circumstances that he intended at the time of payment to appropriate it to one account specifically. *Shaw v. Picton* 455

And see **Principal and Surety**, 1.

PLEADING. See **Vendor and Purchaser**, 6.

POOR LAW—1. Inspection of accounts—Mandamus.—Where a party applies for a mandamus to compel churchwardens to allow him to inspect their accounts according to the directions of the 17 Geo. II. c. 38, he must state some special reason for which he wishes to see the accounts.

It is no answer to the application, that the statute imposes a penalty upon a churchwarden improperly refusing the inspection. *R. v. Clear* 498

— 2. **Parish property—In whom vested—Corporate capacity of churchwardens and overseers.**—The 59 Geo. III. c. 12, s. 17, vests in the churchwardens and overseers of the poor, in the nature of a body

corporate, all buildings, lands, and hereditaments belonging to the parish : Held, that in order to constitute the body corporate intended by the Act, there must be two overseers, and a churchwarden or churchwardens, and that where there were two overseers appointed, one of whom was afterwards appointed (by custom) sole churchwarden, the Act did not vest parish property in them. *Woodcock v. Gibson* 325

POOR LAW—3. Personal liability of churchwardens and overseers for goods.—By a local Act for the government of the poor of the parish of G. the churchwardens and overseers, and nine guardians and directors, or any five or more of them, were empowered to contract for the supply of the poor with provisions, and the parochial funds were directed to be paid into the hands of a treasurer, who was to apply the money under the orders of the governors and directors. Where the plaintiff contracted with the governors and directors for supplying the poor-house with goods, and acted under the orders of the churchwardens and overseers : Held, that the latter were personally liable, and that the plaintiff was not bound to join the governors and directors in the action. *Lambert v. Knott* 535

— 4. **Rate—Quarry—Occupation on default under agreement.**—The proprietors of certain lime-stone quarries agreed to deliver to a canal company yearly such quantities of good lime-stone as the canal company should direct, at the rate of 7*d.* per ton, and if they should at any time neglect to deliver the quantities required, it should be lawful to the Company to enter into or upon the lands or lime-stone quarries of any of the proprietors, and to take such quantities of lime-stone as they should think proper, paying 2*d.* per ton. The proprietors of the lime-stone quarries having failed to supply the lime-stone required, the Company entered, and continued for more than twenty years to work the quarries, and take the lime-stone at 2*d.* per ton : Held, that the Company had not any exclusive occupation, but a mere privilege, and consequently that they were not liable to be rated to the poor. *R. v. Trent and Mersey Navigation* 212

— 5. — **Canal running through several parishes—Dues payable on goods.**—By a Canal Act, the proprietors of the Oxford Canal were empowered to take a certain sum per ton per mile upon all goods. By a subsequent Act for making a new canal, reciting that it was apprehended that the making of the intended canal would be injurious to the proprietors of the Oxford Canal, it was enacted that, as a compensation for that injury, instead of the mileage duty payable to the proprietors of the Oxford Canal, it should be lawful for them to take, for all coals which should pass from the Oxford Canal into and upon the intended canal, so much per ton, without any regard to the distance the coals should pass along the Oxford Canal ; and for all other goods which should pass from any other navigable canal into the Oxford Canal, and from thence into the intended canal, or from the intended canal into the Oxford Canal, and from thence into any other navigable canal, a certain other sum per ton, without regard to the distance the goods should pass from the Oxford Canal : Held, first, that the proprietors of the Oxford Canal were rateable to the poor in respect of their mileage duty in every parish through which the canal passed.

Secondly, that they were liable also to be rated in every parish along which the canal passed for a proportion of the compensation duty. *R. v. Oxford Canal Navigation* 216

— 6. — **Rent-charge in lieu of title.**—Where an Inclosure Act enacted that the tithes of a certain parish should be extinguished, and that in lieu of them the commissioners should award to the rector a certain annual rent, equal in value to a certain portion of the lands in the parish, to be paid by the owners of those lands in such proportions as the commissioners should award : Held, that the rector was liable to be rated to the poor in respect of this rent or annual payment, the Act not having expressly exempted it from that burthen. *R. v. Boldere* 330

POOR LAW—7. **Rate**—**Right of common**.—The burgesses of Nottingham, and the occupiers of ancient messuages there, had as such, for a certain portion of the year, a right to turn cattle into certain fields, and to exclude, during that period, the owner of the soil: Held, that this was a mere right of common, and not rateable to the relief of the poor. *R. v. Churchill* 473

— 8. **Settlement of pauper**—**Order of removal**—**Mandamus**.—Upon an appeal against an order of removal, the justices at Sessions were equally divided in opinion upon a question of fact, on which the settlement of the pauper depended. The Sessions thinking that it lay on the respondent parish to establish their case to the satisfaction of a majority of the Court, quashed the order of removal. The Sessions having decided the case, this Court refused a mandamus. *R. v. The Justices of Monmouthshire* . . . 478

POSSESSION. See **Trespass**, 2.

POWER, Exercise of. See **Bankruptcy**, 1.

And see **Will**, 10, 11.

POWER OF SALE—**Execution**.—A trustee having a power to sell an estate of which the beneficiary was tenant for life without impeachment of waste, sold and conveyed the land only, received the money for it, and applied it to the purposes of the trust; the beneficiary, by the same conveyance, sold and conveyed the timber, and received the money for it.

Held, that the power was not well executed. *Cholmeley v. Puxton* . . . 619

And see **Fine**.

PRACTICE 1.—**Costs**—**Action conducted by unqualified solicitor**.—The circumstance that the plaintiff's cause has been conducted by one who is not an attorney does not deprive the plaintiff of his right to full costs against defendant [but see 37 & 38 Vict. c. 63, s. 12] *Reeder v. Bloom* 557

— 2. — **Appeal as to costs**.—Where there is a fair and substantial question to be argued on appeal the decree may be varied as to costs, though affirmed in every other point; but it will not be varied as to costs, where the point, which is presented as the ground of appeal, has no substance. *Att.-Gen. v. Butcher* 41

— 3. — **Taxation of costs**.—If it is agreed that A. B. shall tax the costs, it is no answer to an action for the costs that the defendant had no notice to attend the taxation; if he did not object to that, when he was first apprized of the taxation having taken place in his absence. *Watson v. Murrel* . . . 779

— 4. **Payment into Court**.—It is competent to the Court, on the hearing of exceptions, at the same time that it allows an exception taken by the defendant, and directs the Master to review this report generally, to order the defendant to pay a sum of money into Court, if it is satisfied that ultimately that sum will be found due from the defendant. *Brown v. De Tastet* 25

— 5. **Affidavit**—**Form of jurat**. See **Evidence**, 4.

— 6. **Parties to action**. See **Partnership**, 5; **Poor Law**, 3.

— 7. **Production of documents**. See **Evidence**; **False Imprisonment**, 2.

PRINCIPAL AND AGENT—1. **Account rendered to principal**.—A., being agent for the grantor and the grantee of an annuity, delivered an account to the grantee, by which it appeared that he, the agent, had received certain payments on account of the annuity; these payments, in fact, had not been received: Held, that the agent was bound by the account which he had delivered, unless he could shew that he had given credit for those payments by mistake. *Shaw v. Picton* 455

PRINCIPAL AND AGENT.—2. Agreement to grant lease—**Personal liability of agent.**—A man describes himself in an agreement for a lease as an agent, but in a subsequent part of the agreement says that he will execute the lease: he is personally liable. *Norton v. Herron* 797

—3. Lien of agent for liabilities incurred on behalf of principal.—A business, which was the property of A., was carried on in the name of B., who was the agent of A. at a fixed salary; B. being under considerable liabilities in respect of that business, A. became bankrupt; B. was held to have a lien on the property of the concern to the extent of his liabilities; and the assignees of A. were restrained from interfering with the business or the property belonging to it, and from receiving monies due to it. *Foxcraft v. Wood* 161

—4. Notice of interest of new principal.—Account.—Where notice is given by a party to his agent in a particular adventure, that another person is jointly interested with him in the adventure, this *prima facie* imposes upon the agent the necessity of accounting with that other person for his share of the adventure. But this obligation ceases to exist, if the transactions shew an intention to the contrary. *Killock v. Greg* 92

And see **Sale of Goods**, 3.

PRINCIPAL AND SURETY—1. Continuing guaranty to bank.—T. having a banking account with plaintiffs, on which he was indebted to them 10,000*l.* in 1822, defendant then executed a bond, conditioned to secure plaintiffs for any sums which for ten years plaintiffs should advance on bills, &c. which T. should from time to time draw on them or make payable at their house, and all cheques, &c. not exceeding 5,000*l.* in the whole. It was agreed that this bond should not affect a prior security given to plaintiffs by T. in 1817; but no notice was given to defendant by plaintiffs that T. was indebted to them 10,000*l.* at the time the defendant executed his bond; T., however, saw the accounts every fortnight, and received the vouchers half-yearly.

At the close of his account, T. was indebted to the plaintiffs more than 10,000*l.*, but subsequently to the executing of the defendant's bond he had paid into the plaintiff's bank more than 5,000*l.*: Held, that the defendant was liable to the extent of 5,000*l.* *Williams v. Rawlinson* 584

—2. Acceptance of collateral security—Discharge of surety. See **Bill of Exchange**, 6.

QUO WARRANTO. See **Corporation (Municipal)**; **Mandamus**.

RATE—Poor rate. See **Poor Law**, 4-7.

RENT-CHARGE—1. Recovery of arrears.—A bill by an executrix for payment of nine years' arrears of an annuity, charged by deed upon real estate, due to her testator, the grantee, to be raised by sale or mortgage, held to be well brought, and relief decreed accordingly; notwithstanding an alleged verbal discharge supported by loose evidence of the defendant's sister, herself originally a defendant; and although by the provisions of the deed the plaintiff might have distrained, or probably had an action of debt, or distress, under the stat. 32 Hen. VIII. c. 37. *Cupit v. Jackson* 735

—2. Distress for. See **Distress**.

RESTRAINT OF TRADE—Breach of covenant.—Declaration, that the defendant, for the considerations mentioned in the deed declared on, (which the plaintiff brought into Court,) covenanted to submit to certain particular restraints in the carrying on of his trade, which covenant he afterwards broke:

Held, on general demurrer, that this was a sufficient statement of consideration for the restraint agreed to. *Homer v. Ashford* 634

REVERSIONER—1. Injury to reversion.—Pulling down an old party wall, and building one longer and higher, the substituted wall encroaching but the breadth of half a brick, is yet, in point of law, an injury of such a permanent nature as to give a right of action to the reversioner. *Harding v. Harrison* 547

— 2. — **Proof of tenancy**.—Case for an injury done to plaintiff's reversionary interest in land, by cutting and carrying away branches of trees growing there. 2nd count in trover for the wood carried away. It appeared in evidence that the land was let by the plaintiff to the occupier under a written agreement: Held, that in order to support the 1st count the plaintiff was bound to produce the agreement.

The plaintiff proved that the defendant carried away some branches of the trees, but gave no evidence of the value: Held, that he was entitled to nominal damages on the count in trover. *Cotterill v. Hobby* 328

RIVER—**Extinction of right of navigation**.—A public right of navigation in a river or creek may be extinguished either by an Act of Parliament or writ of *ad quod damnum* and inquisition thereon, or under certain circumstances by commissioners of sewers, or by natural causes, such as the recess of the sea or an accumulation of mud, &c., and where a public road obstructing a channel (once navigable) has existed for so long a time that the state of the channel at the time when the road was made cannot be proved; in favour of the existing state of things it must be presumed that the right of navigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to that navigation.

Every creek or river into which the tide flows is not on that account necessarily a public navigable channel, although sufficiently large for that purpose, per BAYLEY, J. *R. v. Montague* 420

SALE OF GOODS.—1. **Delivery**—Goods left in possession of unpaid seller.—A., a hop-merchant, on several days in August, sold to B., by contract, various parcels of hops. Part of them were weighed and an account of the weights, together with samples, delivered to the buyer. The usual time of payment in the trade was the second Saturday subsequent to the purchase. B. did not pay for the hops at the usual time, whereupon A. gave notice that unless they were paid for by a certain day they would be re-sold. The hops were not paid for, and A. re-sold a part, with the consent of B., who afterwards became bankrupt, and then A. sold the residue of the hops without the assent of B. or his assignees. Account sales of the hops so sold were delivered to B., in which he was charged warehouse rent from the 30th of August. The assignees of B. demanded the hops of A. and tendered the warehouse rent, charges, &c.; and, A. having refused to deliver them, brought trover. The jury found that defendant had not rescinded the contract of sale: Held, that the assignees were not entitled to maintain trover to recover the value of the hops, inasmuch as in order to maintain that action, the party must have not only a right of property but a right of possession, and that although a buyer of goods acquires a right of property by the contract of sale, yet he does not acquire a right of possession to the goods until he pays or tenders the price. *Bloxam v. Sanders* 519

— 2. — **Property in goods**—**Right of buyer to maintain action for damage**.—A., resident at Naples, sent an order to M. & Co., hardwaremen at Birmingham, "to despatch to him certain goods on insurance being effected. Terms, three months' credit from the time of arrival."

M. & Co. (having marked the package with A.'s initials,) dispatched the goods by the canal to Liverpool, and effected an insurance, declaring the interest to be in A. At Liverpool, the goods were delivered by the agent of M. & Co. to the owner of a vessel bound to Naples, through whose negligence they were damaged: Held, that the property in the goods vested in A. as soon as they were dispatched from Birmingham, and that the terms of the order did not make the arrival of the goods at Naples a condition precedent

to A.'s liability to pay for them, and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship owner. *Fragano v. Long* 226

SALE OF GOODS.—3. Authority of Agent.—If a tradesman living in the country receive goods, ordered on his behalf by a person in London, and pay for them in several instances, he is liable for goods furnished on an order given by such persons afterwards, though he did not receive them, such person having appropriated them to his own use. *Gillman v. Robinson* 793

— **4. Implied warranty of quality.**—If a commodity having a fixed value, is sold for a particular purpose, and it turns out unfit, an action lies though there has been no warranty.—*Gray v. Cox* 769

— **5. Sale by auction—Employment of puffer.**—The seller of a horse stationed his servant to join in the bidding at a public auction, and the servant bid up to 23*l.* after a *bond fide* bidder had bid 12*l.*: Held, that the sale could not be enforced against a subsequent bidder. *Crowder v. Austin*. 646

SCHOOL. See Charitable Trust.

SEA-SHORE.—Grant of foreshore, rights of grantee under.—By lease and release dated in 1773, A. B. lord of the manors of M. H. and P. P. bargained and sold unto C. D., E. F. & G. H. "all that messuage, tenement, boat-house, &c., and also all that and those the sea-grounds, oyster layings, shores, and fisheries of him A. B., commonly called and known by the name and names of M. H. and P. P. shores or sea-grounds, with full and free liberty to C. D., E. F. and G. H. and their heirs and assigns for ever to fish, dredge, and lay oysters thereon, and from thence to take and carry away the same; which said sea-grounds, oyster-layings, shores, and fisheries, extended from the south at low-water mark, to the north at high-water mark, and from certain sea-grounds on the east to other sea-grounds on the west: reserving to the grantor all wrecks and franchises. And the grantees were to hold the messuage, sea-grounds, shores or fisheries, with the appurtenances, of the grantor, lord of the two manors, by such suit of court, and other services as were or of right ought to be done and performed by other the freehold tenants of the same respective manors: Held, that by this deed the right of soil in the sea-shore passed to the grantees.

It appeared that since the date of the deed the sea had imperceptibly and gradually encroached upon the land, and consequently that the high and low water mark had varied in the same degree. Held, that by the deed the right of soil in that portion of land which from time to time lay between high and low water mark passed to the grantees. *Scrutton v. Brown* 344

SEDUCTION. See Evidence, 2.

SET-OFF.—Officers' pay—Estoppel. See Army, 3.

SETTLEMENT (MARRIAGE)—1. Covenant not to incumber—Subsequent mortgage of interest.—A. being tenant for life of certain premises, with a power of limiting jointure to his wife, a settlement is executed on his marriage, by which he demises the lands, of which he was tenant for life, to trustees for a term of ninety-nine years, on trust to secure the payment of a yearly sum to his wife as pin-money during the coverture, and he limits a jointure to her after his death; the same parties on the same day execute another instrument, by which A. covenants not to sell or incumber the lands comprised in the term, and it is declared, that, if he shall at any time sell or incumber them, or attempt so to do, the trustees of the term shall receive the rents and profits, and apply them, as they may think fit, for the maintenance and support of A. or his wife or children or issue: Held, that the covenant and this proviso are fraudulent and void as against a subsequent incumbrancer of A.'s life estate. *Phipps v. Lord Ennismore* 27

SETTLEMENT (MARRIAGE)—2. Covenant to leave by will.—

By covenant in a marriage settlement, the husband was bound to give by his last will or otherwise, to his children in equal shares all his real estates, other than a settled estate, and personal property: Held, that the covenant bound only such real estate as he should die seised of;

That the covenant bound shares of the settled estate, which the husband became entitled to by devise from a child, who died in his lifetime;

That children living at the death of the husband were alone entitled to the benefit of the covenant. *Needham v. Smith* 107

— 3 **Ante-nuptial settlement—Costs.** See **Husband and Wife, 3.**

And see Fine.

SHIP—Bill of lading—Freight.—Goods were consigned to L. C. & Co. or their assigns, "he or they paying freight for the same." L. C. & Co. indorsed the bill of lading to K., their broker, and then became bankrupt; the ship-owner, in ignorance of these circumstances, applied to L. C. & Co. for the freight, and then sued K. for it: Held, that K. was liable. *Dougal v. Kemble* 648

SOLICITOR AND CLIENT.—1. Costs—Personal undertaking by solicitor to pay costs.—If the attorneys on both sides, on an indictment against a parish for not repairing a road, enter into an agreement in which one "agrees, on the part of the parish, to pay the costs," this agreement is personally binding on the attorney. *Watson v. Murrel* 779

— 2. **Partnership books and clients' papers—Dissolution of partnership—Expiration of term.**—A former managing partner who offered to allow a receiver free access to books and other documents, held not compelled to deliver to the receiver for the purpose of making out bills of costs, partnership books and accounts, and deeds belonging to clients. *Dacie v. John* 706

— 3. **Retainer by another on behalf of client.**—A solicitor was employed for a man by his father to defend an action. If the son knew of the retainer, and did not disapprove of it, he is bound by the acts of the solicitor, in the same way as if he had himself employed him. *Cameron v. Baker* 777

— 4. **Undertaking by solicitor—Statute of Frauds.**—The Court will not allow a solicitor to set up the Statute of Frauds, to escape the consequence of a written undertaking, which he has given in a cause: And they will enforce such an undertaking upon motion, and not leave the party to his action. *Senior v. Butt* 546

— 5. **Costs of obtaining Special Act for Company, Action for.** See **Company.**

— 6. **Unqualified solicitor, Conduct of action by—Costs.** See **Practice, 1.**

And see Vestry.

SPECIFIC PERFORMANCE.—Action by infant. See **Infant, 5.**

STAMP DUTY.—1. Voluntary deed—Conveyance on sale.—Where a father, seised in fee of an estate, conveyed it to his son by a deed which recited that he (the father) was minded, and had resolved to give and assure it to his son, as well in consideration of natural love and affection, as also in consideration of the provision which the son had that day made (by his bond) of 1,500*l.* in augmentation of the portions or fortunes of his sisters: Held, that this was not a "sale" to the son within the meaning of the statute, and that the conveyance was not subject to the *ad valorem* stamp duty. *Denn v. Manifold* 237

— 2. **On promissory note—Power of Inland Revenue Commissioners to accept penalty.** See **Bill of Exchange, 7.**

STAMP DUTY.—3. Unstamped counterpart of duly stamped agreement. See Evidence, 11.

TENANT FOR LIFE.—1. Obligation to renew lease.—A testator devised premises, which he held by lease under the Dean and Chapter of Westminster, to A. for life, subject to the payment of all fines and rents as they became due yearly; and he directed that, after A.'s decease, the premises should be vested in two trustees, who were to manage the same to the best advantage, and were to pay all rents and fines until B., to whom the testator bequeathed all the remaining term and interest which he had in the lease, should attain his age of twenty-one years: the lease was held at a nominal rent, and contained no covenant to renew; but the custom of the Dean and Chapter was to renew every seven years on receiving a reasonable fine; and, at the death of the testator, about thirty years of the term were unexpired: Held, that A. was not bound to renew the lease at any time during her life. *Capel v. Wood* 162

— 2. Over-payments to—Set-off. See Trust, 2.

And see Settlement (Marriage).

TITHE. See Vendor and Purchaser, 5.

TRESPASS.—1. Ejecting trespasser—Request to leave.—If a person enter a house with force and violence, the person whose house is entered may justify turning him out (using no more force than is necessary), without a previous request to depart. But if the person enter quietly, a request to depart is necessary before turning him out. *Tulley v. Reed* 766

— 2. Right to maintain action for—Crown land—Occupier under parol licence.—A. paid a nominal rent to the King for 1,000 acres of woodland, the wood being all reserved to the Crown. During four months in the year, A. exercised the privilege of shooting over the land, and by his permission another person took the grass: Held, that this was sufficient evidence to shew that A. was in the actual possession of the land, so as to entitle him to maintain trespass.

A. occupied under a parol licence from the Crown, and the rent paid by him was much less than one third of the annual value of the land: Held, that as A. had no legal conveyance from the Crown by matter of record, and as the rent reserved was not one-third of the annual value of the land, as required by the 1st Anne, st. 1, c. 7, s. 5, he had no legal right to retain possession of the land as against the Crown, but that as he occupied with the permission of the Crown, his possession was sufficient to enable him to maintain trespass against a wrong-doer.

Seem, that a person who occupies Crown land under a parol licence is not an intruder. *Harper v. Charlesworth* 405

— 3. By dog.—A dog jumping into a field, without the consent of its master, is not a trespass, for which an action will lie. *Brown v. Giles*. 769

And see Game.

TROVER AND CONVERSION.—Measure of damages.—In trover, the jury are not limited to find as damages the mere value of the property at the time of the conversion, but they may find as damages the value at a subsequent time, in their discretion. *Greening v. Wilkinson* 790

And see Infant, 3; Reversioner.

TRUST.—1. Breach of trust—Negligence—Trust money left in hands of co-trustee.—Trustees charged with a loss to the estate, and interest, occasioned by their voluntarily permitting a co-trustee to receive purchase-money and retain it a considerable time before calling for security, contrary to the trust; notwithstanding a provision in the will that each trustee should only be answerable for money actually received by him. *Bone v. Cook* 697

TRUST—2. Breach of trust—Neglect to convert trust funds—Over-payments to tenant for life—Set-off of profit derived from unauthorized investment.—A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in Government or real securities, of which they were to stand possessed, upon trust for A. during her life, and after her death, for B. The trustees permitted a share which the testator had in an Indian loan, bearing interest at 10 $\frac{1}{2}$ per cent., to remain for several years on that security, during which time they paid to A. the interest at 10 $\frac{1}{2}$ per cent. which it yielded annually; and, the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death: Held, that the tenant for life was not entitled to the actual interest which the money yielded while it remained on the Indian security, but only to the dividends of so much 3 per cent. stock as would have been purchased with it at the end of a year from the testator's death;

Held, also, that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest; and that they ought to be allowed in their discharge, as payments to the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends, if the money had been transferred from the Indian security and invested in the 3 per cent. stock at the end of a year from the testator's death. *Dimes v. Scott* 46

— 3. — **Retirement of trustee—Assignment of trust property to continuing trustee only—Provisions in settlement.**—Where a settlement requires that a retiring trustee should assign the trust property to the continuing trustee, and that a new trustee should be chosen in the place of the retiring trustee, and there is no power to appoint a sole trustee; then, if a retiring trustee assign the trust property to the continuing trustee alone, and he, in abuse of his trust, dispose of it, the retiring trustee is answerable. *Wilkinson v. Parry* 84

VENDOR AND PURCHASER—1. Interest on purchase-money.—A purchaser, who has not been in possession, is bound to pay interest on the purchase-money, and take the rents and profits, only from the time when a good title was first shewn, and not from the time fixed by the agreement for the completion of the purchase. *Jones v. Mudd* 22

— 2. **Specific performance—Costs.**—In a suit for specific performance by a vendor, the costs will be thrown upon the purchaser, though the Master reports that a good title was not shewn till after the filing of the bill, if that finding proceeded on the ground that certain evidence had not been previously furnished, which the vendor had offered to produce, but which had not been actually produced, before the institution of the suit, in consequence of the purchaser insisting upon other and unsubstantial objections. *Long v. Collier* 79

— 3. — **Title—Contents of destroyed deeds.**—If, after a contract for sale of an estate, but before the title is accepted, the title-deeds be destroyed by fire, the Court will not compel the specific performance of the contract, unless the vendor can furnish the purchaser with the means of shewing what were the contents of the destroyed deeds, and of proving that such deeds were duly executed and delivered. *Bryant v. Bush* 1

— 4. — **Title to copyholds.**—The generality and vagueness of descriptions of copyhold property on the Court rolls are so well known, that a vendor is not bound to shew, how the description on the Court roll is to be applied to the present state of the property, if he prove that the property has actually been enjoyed and passed under that description for upwards of sixty years. *Long v. Collier* 79

VENDOR AND PURCHASER—5. Specific Performance—Defect in title, Compensation for—Tithe—Agreement to sell tithe free—As a general rule, where land is agreed to be sold tithe free, the right to the tithe is to be considered so material to the enjoyment of the land, that a purchaser is not compelled to complete his contract with a compensation, if a good title cannot be made to the tithe; but this rule admits of exception, where the circumstances manifest, that the right to the tithe did not form any inducement to the purchaser to enter into the contract. *Smith v. Tolcher* 103

— 6. — **Title—Averment—Plea of purchase for valuable consideration without notice.**—A plea of purchase for valuable consideration without notice, must aver that the vendor pretended to be seised, not merely before, but at the respective times of the execution of the conveyance, and of the payment of the consideration. *Jackson v. Rowe* 168

— 7. — **Undertaking to surrender copyholds.**—If A., for valuable consideration, undertakes to surrender a copyhold to B., and B., on borrowing money from C., enters into a written agreement with C., that he, B., will surrender the same copyhold to C. by way of mortgage security, A. is not justified in refusing to surrender the copyhold to B., because he, A., has received notice from C. of the agreement between him and B.

The surrender by A. to B. does not prejudice, but promotes, that agreement. — *v. Wulford*. 129

VESTRY—Personal liability of vestrymen.—Vestrymen who signed a resolution, ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were held not to be responsible for the payment of the attorney employed by the surveyor. *Sprott v. Powell* . 665

VOLUNTARY DEED—Stamp Duty on. See Stamp Duty.

WAY—Evidence of Dedication.—A public footway over Crown land was extinguished by an Inclosure Act, but for 20 years after the inclosure took place the public continued to use the way: Held, that this user was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the Crown. *Harper v. Charlesworth* . . . 405

WILL.—1. Annuity—Abatement.—A testator, by his will, gave certain annuities, and directed that the sums set apart to secure them should, as the annuitants died, sink into the residue of his personal estate: By a codicil he directed, that, in case his property would not provide an income equal to the annuities, they should be rateably reduced: His estate was deficient, and the annuities were rateably reduced: Upon the death of any annuitant, the sum set apart to secure the reduced annuity will belong to the residuary legatees, and is not to be applied to increase the reduced annuities to the amount given by the will. *Farmer v. Mills* . . . 14

— 2. **Condition—Marriage with consent.**—A testator gave to his daughter a legacy of 10,000*l.*, "payable and to be paid unto her in manner following, viz., a sum of 5,000*l.* upon her marriage under twenty-one, with the consent of his trustees, and the sum of 5,000*l.*, within two years afterwards." The daughter married under twenty-one, without consent of the trustees; and, her first husband dying, she married a second husband at the distance of thirty years from her first marriage;

Quære, if, on the second marriage, she became entitled to the 10,000*l.* *Clifford v. Beaumont* 111

— 3. **Contingency in will, whether cumulative legacy given by codicil subject to.**—A testatrix directs that her trustees (who were also her executors) should, within a year after her decease, pay to the several persons named in a schedule to her will, the sums set opposite to their respective names, as vested and transmissible interests: in a subsequent

clause she gives 3,000*l.* to the trustees, upon trust to invest the same, and pay it to A. on her attaining twenty-one, with a proviso that it should fall into the residue, if A. died under twenty-one: by the schedule to her will, she gives to her executors 600*l.* in trust for A. in addition to the 3,000*l.* given by the will: Held, that the legacy of 600*l.* was not affected by the contingency to which the 3,000*l.* was subject, but vested immediately. *Tilbury v. Wakeford* 178

WILL.—4. “Failing the male issue.”—In a will, the words “failing the male issue,” were, upon the whole context, construed to mean, “if there shall be no son then living.” *Murray v. Addenbrook* 144

— 5. **Gift in default of appointment.**—A testamentary gift in default of appointment by a legatee for life does not fail by the death of the legatee before the testator.

A testatrix gives a legacy to the sole and separate use of her daughter for life, with a power of appointment, and in default of appointment, to her next of kin, “as if she had died sole and intestate, to the utter exclusion of her husband:” This expression will not exclude a child of the daughter, but is to be considered as used for the sole purpose of excluding the husband. *Hardwick v. Thurston* 130

— 6. “Heir.”—Where a pecuniary legacy is given by a testator to his heir, the word is to be understood in its legal and ordinary sense, unless controlled by the context of the will; and the heir-at-law will take the legacy, and not the next of kin. In such a case, it makes no difference, that there are three co-heirs. *Mounsey v. Blamire* 133

— 7. **Legacy duty—Bequest of annuity “without any deduction . . . whatsoever.”**—A testator gave annuities, and directed them to be paid without any deduction whatsoever. From the nature of the property out of which the annuities were to be paid, there could be no deduction, except in respect of legacy duty: Held, that the annuities were payable clear of legacy duty. *Smith v. Anderson* 122

— 8. **Period of Vesting.**—A testator gave the residue to his widow during her life, and at her demise, to the eldest surviving son of A. upon his attaining twenty-five (the trustees being directed to apply the interest to his use till he attained that age), or, failing male issue, to the daughters of A. living at the time of the demise of the last of such male issue; the only son of A. died under twenty-five, in the lifetime of the widow, leaving two daughters of A. him surviving: Held, that, if there had been any son of A. living at the death of the widow, he would have taken a vested interest in the residue, though he had not then attained the age of twenty-five:

That the gift over of the residue to the daughters of A. was not too remote, and that, in the events which happened, they, upon the death of the widow, became entitled to the residue. *Murray v. Addenbrook* 144

— 9. — **Gift over on death before actual receipt.**—The intention of a testator, that his gift should not vest in the legatee, until it should be actually remitted to him, will prevail, when clearly expressed, provided the remittance be not delayed by negligence or inevitable accident. *Law v. Thompson* 17

— 10. **Power to give to “relations”—“Family.”**—Where a donor recommends or directs that the donee, at her death, shall give his personal property to such of his family or such of his relations as she shall think fit, the donee has a power to select the objects of her bounty amongst his relations or family, though not within the degree of next of kin.

But if the donee does not exercise the power, the word “relations,” or the word “family,” will be construed “next of kin,” unless the special expressions of the donee have a different import. *Grant v. Lynum* 97

WILL.—11. Power, Exercise of.—Personal estate was given to a wife for life, and after her death one moiety was placed “at her entire disposal, either by will or otherwise.” The sale by the widow of a sum of 3 per cent. stock, which constituted nearly the whole of the residue, and the investment of the proceeds in the purchase of Long Annuities in her own name, held not to amount to an exercise of her power. *Reith v. Seymour* 77

— 12. **Remoteness.**—A testator having bequeathed a yearly sum to a person for life, gave the annuity, upon the death of the annuitant, to the eldest surviving son of A., and, failing the male issue of A., to the daughters of A. living at the demise of such male issue; at the death of the annuitant, A. had no son living, but had two daughters: Held, that the gift to the daughters of A. was not too remote, and that they were entitled to the annuity. *Murray v. Addenbrook* 144

— 13. **Specific legacy—Condition—Payment of debts.**—A testator gives a specific bequest to A., and directs, that, in consideration of the bequest, A. shall pay his debts, and makes A. his residuary legatee, and executor: the payment of the debts is a condition annexed to the specific bequest, and, if A. accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him. *Messenger v. Andrews* 156

— 14. — **Failure of gift.**—A testatrix gave such of her jewels, as should, at her death, be deposited in her jewel-box at Rundell and Bridge’s, to persons whose names would be found written on a paper contained in the box, and bequeathed the rest of her jewels to A. B.; two years before her death she became the subject of a commission of lunacy, and no jewel-box was then, or at the date of her will, or at her death, deposited at Rundell and Bridge’s, nor was there any written paper designating who were to take the jewels. The intended gift of the jewels wholly fails. *Jerningham v. Herbert* 136

— 15. **“Survivors.”**—The word “survivors,” in a bequest to children, held, upon the context of the will, to mean, surviving so as to attain their respective ages of twenty-one. *Crozier v. Fisher* 141

— 16. **What estate passes.**—A gift of personal estate to the wife for life, with a direction, that, after her death, one moiety thereof shall be at her entire disposal, either by will or otherwise, amounts only to an estate for life in the wife, with a power of appointment. *Reith v. Seymour* 77

— 17. — **C. devised lands to a married woman for her life, and then to the intent that she or her husband should not be entitled to receive the rents of the tenant, appointed trustees to receive them, pay them over to the wife, and attend to repairs; with power to distrain, lease, &c. By a codicil C. revoked the devise in the will, the trustees named therein having died, and devised the land to other trustees, to the same intents, and in the same manner in all respects, as if the new trustees had originally been named trustees in the will: Held, that the new trustees took the legal estate in the land.** *Tenny v. Moody* 552

— 18. — **Gift over “in case A. shall die without leaving lawful issue.”**—A gift of real estate to A. for life, with remainder to her children, as tenants in common, and, in case A. shall die without leaving lawful issue, then with remainder over, is a gift to A. for life, with remainder to her children for life, with remainder to A. in tail. *Parr v. Swindels* 90

— 19. — **Gift to a class and their issue.**—A bequest to all the children of A. and their issue, in case any of them should die leaving issue, share and share alike, and to be paid twelve months after the testator’s decease, is an absolute gift to such children of A. as are living at the testator’s death, with a substitution of their issue in case of death before period of division.

A testator bequeathed the residue of his estate, after the death of two persons, to such children of B. as should be then living; and as to such of them as should be then dead, leaving children, he directed that the children should stand in the place of their parents: Held, that the children of such children of B. as died in the testator's lifetime took no share of the residue. *Butler v. Ommaney* 6

WILL.—20. What estate passes—Gift to class—Death of one—Lapse.—Testatrix devised real estate to S. J. for her life, and after her death and failure of issue, to trustees, to sell and pay the proceeds to four persons in prescribed proportions; and in case of the death of any of the legatees “before such their respective legacies should or might become payable, then the legacy or part of him, her, or them so dying, to go to his, her, or their executors or administrators, as part of his, her, or their personal estate.” And she gave the residue of the real and the personal estates to the trustees, upon trust as to the former, to sell and invest the proceeds, and as to both, to pay the interest, dividends, produce, and proceeds to S. J. for her life; and after her decease to pay certain pecuniary legacies, and then to pay the remaining trust monies to the same four persons, in the same proportions; “and in case of the death of any of the said legatees before their legacies should become payable,” then the testatrix directed that “the legacy of each of them dying shall go to, and be paid amongst his, her, or their children, share and share alike; and in case of such decease of any of the said legatees, without having a child or children, the legacy of him or her so dying, shall go to his or her executors or administrators, as part of his or her personal estate.” One of the four legatees having died in the lifetime of the testatrix, unmarried, held, upon the death of S. J. subsequently, without issue, that the legacy to that legatee had lapsed; although her children, if there had been any, would have been entitled to take it. *Bone v. Cook* 697

— 21. — **Partial revocation of trusts of will by codicil.**—A testator, in the case of an event which happened after his death, directed a freehold estate to be sold, and the produce applied upon the trusts, intents, and purposes afterwards expressed in his will, as to his residuary personal estate: by a codicil, he revoked the gift in his will of his residuary personal estate, and made a new disposition of it. The produce of the freehold estate is not thereby affected, but passes upon the trusts, intents, and purposes, which were expressed in the will as to the residuary personal estate. *Francis v. Collier* 115

— 22. — **Words passing real estate.**—A gift to A. and B., “whom I appoint my executors of all that I possess in any way belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be,” will pass the fee simple of real estate. *Thomas v. Phelps* 120

— 23. — **“Monies, goods, chattels, stocks.”**—Whether stock will or will not pass under the word “monies,” or under the word “goods,” or under the word “chattels,” depends upon the whole context of the will.

The word “goods,” and equally the word “chattels,” used simply and without qualification, will pass the whole personal estate, including stock.

A bequest of “all monies, goods, chattels, clothing, &c., the testator's property, which may remain after paying his funeral charges and debts,” will pass the testator's interest in stock and money. *Kendall v. Kendall* 125

— 24. — **Scots heritable bond.**—A Scotch heritable bond, although it contained a personal obligation to pay the debt, does not lose its heritable quality, and will not pass by an English will, but descends to the heir-at-law. *Jerningham v. Herbert* 136

— 25. — **Devise of lands and personalty, in trust out of the rents to apply 250*l.* a year to the maintenance of devisor's daughter till she should be twenty-one, or marry, and out of the residue as much as should be thought necessary for the maintenance of devisor's son till he should be twenty-one**

or his sister marry, and upon his attaining twenty-one or his sister's marrying, to raise 5,000*l.*, and pay the interest of it to the daughter after her attaining twenty-one or marrying; and subject thereto that the trustees should stand seised of the residue in trust for the son till he attained twenty-one, and then to the use of the son, his heirs, &c., for ever. But in case the son should die under twenty-one and the daughter survive, or in case the son should live to twenty-one and afterwards die without lawful issue, to the use of the trustees till the daughter attained twenty-one or married, and then to the use of the daughter for life, with remainders over.

Held, that the trustees took the legal estate till the 5,000*l.* was raised, and that but for the intervention of the trustees the son would have taken a fee with an executory devise over in the event of his dying without issue living at the time of his death. *Glover v. Monckton* 559

WORDS "Chattels." See **Will**, 23.

— "Failing the male issue." See **Will**, 4.

— "Family." See **Will**, 10.

— "Goods." See **Will**, 23.

— "Heir." See **Will**, 6.

— "Monies." See **Will**, 23.

— "Relations." See **Will**, 10.

— "Stranding." See **Insurance (Marine)**, 3.

— "Survivors." See **Will**, 15.

— "Term." See **Landlord and Tenant**, 4.

— "Without any deduction whatsoever." See **Will**, 7.

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